

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



76-6070 76-6080

*Signed*

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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JOSEPH C. WEBER, INC.,

Plaintiff-Appellee-Cross-Appellant

v.

UNITED STATES OF AMERICA,

Defendant-Appellant-Cross-Appellee

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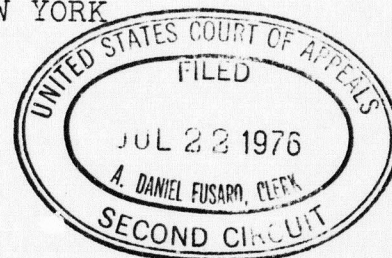
ON APPEALS FROM THE JUDGMENT OF THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF NEW YORK

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APPENDIX

(Vol. I (pp. 1-136))

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Civ-1970-4 Joseph C. Weber, Inc. v. USA

DATE 1970	PROCEEDINGS	Date Order of Judgment Not
Jan. 7	Filed Complaint & Demand for Jury Trial	
7	Issued summons & 4 copies	
7	JS 5 made	
16	Filed summons-served 1/15/70	
Mar. 9	" Deft's. Answer	
Aug. 25	" Deft's. Interrogatories	
Sept. 29	" Pltf's. Answer to Interrogatories	
1971		
Jan. 7	" Pltf's. Note of Issue-March 1971 Term	
Feb. 22	" Deft's. Notice to take deposition	
May 27	" Deposition of Joseph C. Weber (Notice to attys.)	
June 16	" Deft's. Request for Production of Documents	
Dec. 14	Pretrial Conference (U.S. Magistrate)	
1972		
Feb. 4	Filed Stipulation of Uncontested Facts	
Mar. 13	" Deft's. Motion for Summary Judgment, Brief for Deft. in support of its motion for summary judgment & Affidavit thereof-(no ret. date per Mr. Grable)-ret. 4/10/72 per ltr. dtd. 3/28/72 fr.	
29	" Pltf's. Opposing Affidavit /Dec. reserved /Pltf's. Atty.	
Apr. 28	" Deft's. Affidavit in support of motion & motion to amend stipulation	
May 23	" Decision & Order denying Deft's. motion for summary judgment-Henderson, J (notice & copy to Messrs. Halpern & O'Connor)	F-128
June 1	" Pltf's. Affidavit	
July 26	" Decision & Order denying Deft's. motion to amend stipulation-Henderson, J (notice & copy to US Atty. & Mr. Halpern)	F-130
1974		
Mar. 27	Filed order directing final pretrial before U.S. Mag. Maxwell on 4-5-74-Curtin, DJ	F-150
June 11	Filed Mar. ret. on Subpoena served on James William Heary, & H.A. Pfitzinger both served on 6-6-74 & M.D. Goodwill on 6-7-74	
1975		
July 11	Pretrial conference (JTC) - court orders case placed on ready calendar--trial 10/14/75 or any day thereafter	
18	Filed ltr. dtd. 7/15/75 to Judge Curtin from U.S. Dept. of Justice, Wash. DC, requesting trial be scheduled for some week in Oct. other than 10/14/75	
Oct. 15	Filed trial memorandum for deft.	
21	Filed letter to Judge Curtin dated 10-20-75 from R. William Stephens	
Nov. 4	Case reached for trial before Judge Curtin and Jury	
5	Trial cont'd	
6	Filed Questions for Jury	
6	Trial cont'd - jury returns with verdict answering questions; court directs Pltf. to prepare and submit the proper judgment for filing with the court.	
17	Filed judgment that pitf. recover of the deft., USA the sum of \$82,154.13 plus interest in the amt. of \$35,722.36 totaling \$117,876.49 together with costs-Clerk Notice to Frank Raichle and U.S. Atty.	F-170
17	JS 6 made	
24	Filed defts. motion for judgment notwithstanding the verdict.	
Oct. 2	" letter to Judge Curtin dated 10-1-75 from R. William Stephens	
Nov. 26	" Pltf's. motion for an order setting aside finding notwithstanding the verdict & for entry of findings ret. 12-8-75.	

CLOSED

Civ-1970-4

[ -2- ]

Joseph C. Weber, Inc. v. U.S.A.

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order Judgment
1975		
Dec. 1	Filed Pltfs. memorandum in support of their motion for an order setting aside finding with respect to the 1st question presented to jury & in opposition to defts. motion for dismissal of the complaint.	
1	" Defts. notice of hearing on motion for judgment notwithstanding the verdict. ret. 12-15-75	
5	" Bill of Costs in the amt. of \$76.50	
15	Pltfs. motion to set aside findings etc. Submitted.	
1976		
Feb. 19	Filed decision & order that the jury's verdict should not be disturbed unless it is obviously unsupported by evidence. Where there is evidence to support the verdict, a motion for judgment notwithstanding the verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure must be denied. All motions are denied - Curtin, DJ Notice & copies to Frank G. Raichle, Scott P. Crampton & U.S. Atty.	F-17
27	Filed transcript of proceedings of 11-4-75	
27	" transcript of proceedings of 11-5-75	
Apr. 19	" Deft's. Notice of Appeal (copy mailed to Mr. Raichle and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to U.S. Atty.)	
23	" Pltf's. Notice of Appeal (copy mailed to U.S. Atty. and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Halpern)	

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

JOSEPH C. WEBER, INC.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Docket No.  
**CIV-1970-4**  
COMPLAINT

The plaintiff, by its attorneys Raichle, Banning, Weiss & Halpern, makes this its complaint against the defendant on information and belief:

1. This action is brought for the recovery of federal income taxes erroneously and illegally assessed against and collected from plaintiff by the Internal Revenue Service, acting for and on behalf of the defendant for the taxable years ended June 30, 1963, 1964 and 1965, together with interest thereon as provided by law.

2. This Court has jurisdiction of this action under the provisions of 28 U.S.C. §1346(a)(1).

3. Plaintiff is a corporation duly organized and validly existing under the laws of the State of New York, with its principal place of business in the County of Niagara, State of New York.

COUNT I

With respect to the taxable year  
ended June 30, 1963

4. Plaintiff repeats and realleges the allegations set forth in paragraphs designated "1" through "3" inclusive of this complaint.

5. In conformity with the provisions of the Internal Revenue Code of the United States, the plaintiff did make and

duly file in a timely manner an income tax return for the taxable year ended June 30, 1963, and did pay in a timely manner the tax reflected and due thereon.

6. Thereafter the Internal Revenue Service erroneously and illegally determined a deficiency of income tax against the plaintiff for the taxable year ended June 30, 1963 by adding to income payments made by Mobil Oil Company in the sum of \$43,274.10.

7. Thereafter there was wrongfully and improperly assessed against the plaintiff the sum of \$ 22,502.53 for additional income tax attributable to said Mobil Oil Company payments for the taxable year ended June 30, 1963, together with the sum of \$6,900.26 as interest thereon.

8. On or about November 7, 1968 plaintiff paid said sum of \$ 22,502.53 as additional income tax plus the sum of \$6,900.26 as interest thereon, for an aggregate of \$29,402.79 .

9. Thereafter on or about June 10, 1969, and within the time required by law, plaintiff filed with the Internal Revenue Service a claim for refund of such wrongfully and improperly assessed income tax. A copy of said claim for refund is attached hereto, made a part hereof and marked Exhibit A.

10. More than six months have elapsed since the filing of said claim for refund.

11. Based upon the grounds set forth in said claim for refund and the facts therein reflected, all of which are incorporated herein by reference, plaintiff erroneously paid the federal income taxes set forth in said claim in the sum of \$22,502.53 , together with interest in the sum of \$6,900.26 for an aggregate of \$29,402.79 .

12. The payment of said sum has been demanded by plaintiff, but no part of said sum has been credited, remitted,

refunded or repaid in any manner to the plaintiff and the full amount thereof, together with interest thereon remains due and owing from the defendant to the plaintiff.

COUNT II

With respect to the taxable year  
ended June 30, 1964

13. Plaintiff repeats and realleges the allegations set forth in paragraphs designated "1" through "3" inclusive, "9," "10" and "12" of this complaint.

14. In conformity with the provisions of the Internal Revenue Code of the United States, the plaintiff did make and duly file in a timely manner an income tax return for the taxable year ended June 30, 1964, and did pay in a timely manner the tax reflected and due thereon.

15. Thereafter the Internal Revenue Service erroneously and illegally determined a deficiency of income tax against the plaintiff for the taxable year ended June 30, 1964 by adding to income payments made by Mobil Oil Company in the sum of \$35,673.47.

16. Thereafter there was wrongfully and improperly assessed against the plaintiff the sum of \$18,195.42 for additional income tax attributable to said Mobil Oil Company payments for the taxable year ended June 30, 1964, together with the sum of \$4,487.79 as interest thereon.

17. On or about November 7, 1968 plaintiff paid said sum of \$ 18,195.42 as additional income tax plus the sum of \$4,487.79 as interest thereon, for an aggregate of \$ 22,683.21.

18. Based upon the grounds set forth in said claim for refund and the facts therein reflected, all of which are incorporated herein by reference, plaintiff erroneously paid the federal income taxes set forth in said claim in the sum of \$ 18,195.42 together with interest in the sum of \$ 4,487.79 for an aggregate of \$ 22,683.21 .

COUNT III

With respect to the taxable year  
ended June 30, 1965

19. Plaintiff repeats and realleges the allegations set forth in paragraphs designated "1" through "3" inclusive, "9," "10" and "12" of this complaint.

20. In conformity with the provisions of the Internal Revenue Code of the United States, the plaintiff did make and duly file in a timely manner an income tax return for the taxable year ended June 30, 1965, and did pay in a timely manner the tax reflected and due thereon.

21. Thereafter the Internal Revenue Service erroneously and illegally determined a deficiency of income tax against the plaintiff for the taxable year ended June 30, 1965 by adding to income payment made by Mobil Oil Company in the sum of \$51,703.17.

22. Thereafter there was wrongfully and improperly assessed against the plaintiff the sum of \$25,338.80 for additional income tax attributable to said Mobil Oil Company payments for the taxable year ended June 30, 1965, together with the sum of \$4,729.33 as interest thereon.

23. On or about November 7, 1968 plaintiff paid said sum of \$25,338.80 as additional income tax plus the sum of \$4,729.33 as interest thereon, for an aggregate of \$30,068.13.

24. Based upon the grounds set forth in said claim for refund and the facts therein reflected, all of which are incorporated herein by reference, plaintiff erroneously paid the federal income taxes set forth in said claim in the sum of \$25,338.80, together with interest in the sum of \$ 4,729.33 for an aggregate of \$30,068.13.

WHEREFORE, the plaintiff prays that judgment be entered in favor of the plaintiff and against the defendant;

(a) With respect to Count I, for the sum of \$29,402.79 with interest thereon as permitted by law.

(b) With respect to Count II, for the sum of \$22,683.21 with interest thereon as permitted by law.

(c) With respect to Count III, for the sum of \$30,068.13 with interest thereon as permitted by law.

(d) The costs and disbursements of this action.

(e) For such other relief, both special and general, in law and in equity, to which plaintiff may be entitled.

RAICHLE, BANNING, WEISS & HALPERN

By: 

A Member of the Firm  
Attorneys for Plaintiff  
10 Lafayette Square  
Buffalo, New York 14203  
Tel: 716 852-7587

TRIAL BY JURY IS HEREBY DEMANDED

<b>Form 843</b> (Rev. June 1968) U.S. Treasury Department Internal Revenue Service	<h2 style="margin: 0;">Claim</h2>	Director's Stamp (Date received)
The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.		
<input type="checkbox"/> Refund of Taxes Illegally, Erroneously, or Excessively Collected. <input type="checkbox"/> Refund of Amount Paid for Stamps Unused, or Used in Error or Excess. <input type="checkbox"/> Abatement of Tax Assessed (not applicable to income, estate or gift taxes).		
Please Type or Print Plainly		
Name of taxpayer or purchaser of stamps <b>Joseph C. Weber, Inc.</b>		
Number and street <b>132 - 87th Street</b>	City or town, State, and ZIP code <b>Niagara Falls, New York 14304</b>	
Fill in applicable items—Use attachments if necessary		
a. Your social security number	Wife's number, if joint return	b. Employer identification number (if any) <b>16-0735142</b>
c. Internal Revenue Service office where return (if any) was filed <b>Buffalo, New York</b>		d. Name and address shown on return, if different from above
e. Period—if for tax reported on annual basis, prepare separate form for each taxable year From <b>July 1</b> , 19 <b>62</b> to <b>June 30</b> , 19 <b>63</b>		f. Kind of tax <b>Income</b>
g. Amount of assessment plus interest <b>\$ 22,502.53</b>		Dates of payment <b>November 7, 1968</b>
h. Date stamps were purchased from Government	i. Amount to be refunded (if income tax, complete computation below) <b>\$ 22,502.53 plus interest</b>	j. Amount to be abated (not applicable to income, estate, or gift taxes)
k. The claimant believes that this claim should be allowed for the following reasons:		

See attachment hereto which is incorporated herein by reference.

COMPUTATION OF INCOME TAX REFUND		Income Tax
1 Tax withheld		
2 Estimated tax paid		
3 Tax paid with original return		7,198.15
4 Any additional income tax paid		30,995.80
5 Total tax paid (add lines 1-4)		38,193.95
6 Less: Your computation of correct tax		15,691.42
7 Amount of overpayment		22,502.53
8 Amount previously refunded		-0-
9 Net overpayment (enter in item 1 above)		22,502.53 plus interest

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed Joseph C. Weber, Inc.  
 Dated June 10, 1969 BY: [Signature] President

SEE INSTRUCTIONS ON REVERSE

Form 843 (Rev. 6-68)

EXHIBIT A

BEST COPY AVAILABLE

<b>Form 843</b> (Rev. June 1968) U.S. Treasury Department Internal Revenue Service	<h2 style="margin: 0;">Claim</h2>	Director's Stamp (Date received)
The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.		
<input type="checkbox"/> Refund of Taxes Illegally, Erroneously, or Excessively Collected. <input type="checkbox"/> Refund of Amount Paid for Stamps Unused, or Used in Error or Excess. <input type="checkbox"/> Abatement of Tax Assessed (not applicable to income, estate or gift taxes).		
Please Type or Print Plainly		
Name of taxpayer or purchaser of stamps <b>Joseph C. Weber, Inc.</b>		
Number and street <b>132 - 87th Street</b>		City or town, State, and ZIP code <b>Niagara Falls, New York 14304</b>
Fill in applicable items—Use attachments if necessary		
a. Your social security number	Wife's number, if joint return	b. Employer identification number (if any) <b>16-0735142</b>
c. Internal Revenue Service office where return (if any) was filed <b>Buffalo, New York</b>		d. Home and address shown on return, if different from above
e. Period—if for tax reported on annual basis, prepare separate form for each taxable year From <b>July 1, 1963</b> to <b>June 30, 1964</b>		f. Kind of tax <b>Income</b>
g. Amount of assessment <b>\$ 18,195.42 plus interest - November 7, 1968</b>		Dates of payment
h. Date stamps were purchased from Government	i. Amount to be refunded (if income tax, complete computation below) <b>\$ 18,195.42 plus interest</b>	j. Amount to be abated (not applicable to income, estate, or gift taxes)
k. The claimant believes that this claim should be allowed for the following reasons:		

See attachment hereto which is incorporated herein by reference.

COMPUTATION OF INCOME TAX REFUND		Income Tax
1 Tax withheld		
2 Estimated tax paid		
3 Tax paid with original return		8,660.12
4 Any additional income tax paid		25,894.14
5 Total tax paid (add lines 1-4)		34,644.26
6 Less: Your computation of correct tax		16,448.84
7 Amount of overpayment		18,195.42
8 Amount previously refunded		-0-
9 Net overpayment (enter in item 1 above)		18,195.42 plus interest

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed Joseph C. Weber, Inc.  
 Dated June 10, 1969 By: [Signature] President

<b>Form 843</b> (Rev. June 1968) U.S. Treasury Department Internal Revenue Service	<h2 style="margin: 0;">Claim</h2>	Director's Stamp (Date received)
<small>The Internal Revenue Service will indicate in the block below the kind of claim filed, and fill in, where required.</small>		
<div style="display: flex; justify-content: space-between;"><div><input type="checkbox"/> Refund of Taxes Illegally, Erroneously, or Excessively Collected.</div><div><input type="checkbox"/> Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.</div><div><input type="checkbox"/> Abatement of Tax Assessed (not applicable to income, estate or gift taxes).</div></div>		
<small>Please Type or Print Plainly</small>		
Name of taxpayer or purchaser of stamps <b>Joseph C. Weber, Inc.</b>		
Number and street <b>132 - 87th Street</b>		City or town, State, and ZIP code <b>Niagara Falls, New York 14304</b>
<small>Fill in applicable items—Use attachments if necessary</small>		
a. Your social security number	b. Wife's number, if joint return	c. Employer identification number (if any) <b>16-0735142</b>
d. Internal Revenue Service office where return (if any) was filed <b>Buffalo, New York</b>	e. Name and address shown on return, if different from above	
f. Period—if for tax reported on annual basis, prepare separate form for each taxable year   f. Kind of tax From <b>July 1</b> , 19 <b>64</b> to <b>June 30</b> , 19 <b>65</b> <b>Income</b>		
g. Amount of assessment plus Dates of payment <b>\$ 25,338.80 interest November 7, 1968</b>		
h. Date stamps were purchased from Government	i. Amount to be refunded (if income tax, complete computation below) <b>\$ 25,338.80 plus interest</b>	j. Amount to be abated (not applicable to income, estate, or gift taxes) <b>\$</b>
k. The claimant believes that this claim should be allowed for the following reasons:		

See attachment hereto which is incorporated herein by reference.

COMPUTATION OF INCOME TAX REFUND		Income Tax
1 Tax withheld		
2 Estimated tax paid		
3 Tax paid with original return		10,469.35
4 Any additional income tax paid		33,088.51
5 Total tax paid (add lines 1-4)		43,557.86
6 Less: Your computation of correct tax		18,219.06
7 Amount of overpayment		25,338.80
8 Amount previously refunded		-0-
9 Net overpayment (enter in item i above)		25,338.80 plus interest

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

Signed Joseph C. Weber, Inc.

Dated June 10, 19 69

By: [Signature]

President

BEFORE THE INTERNAL REVENUE SERVICE  
-----

In the Matter

-of-

CLAIM FOR REFUND

the Refund Claim made by Joseph C.  
Weber, Inc. for the taxable years  
ended June 30, 1963, 1964 and 1965.  
-----

District Director of Internal Revenue  
34 West Mohawk Street  
Buffalo, New York

Re: Joseph C. Weber, Inc.  
132 - 87th Street  
Niagara Falls, New York 14304

Sir:

The above named taxpayer, a New York corporation,  
hereby claims refund for federal income taxes assessed and paid  
for the taxable years ended June 30, 1963, 1964 and 1965 together  
with interest as provided by law, which was paid on November 7, 1963.

The taxpayer takes exception to the assessment, adjust-  
ment and finding that commissions paid by Mobil Oil Company to  
Joseph C. Weber for the sale of fuel oil should be taxed to the  
taxpayer on the theory that it "earned" the commissions.

The facts upon which the taxpayer relies concerning the  
contested issues are as follows:

Pursuant to arrangements which have varied from time  
to time, Mobil Oil Company has paid to Joseph C. Weber individually,

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a broker's commission on sales of fuel oil for which he is responsible. This arrangement existed prior to the incorporation of Joseph C. Weber, Inc. and originally was evidenced by a letter or written contract between Mr. Weber and Mobil. Subsequently, at the request of Mobil, the written contract was cancelled and the arrangement continued on a more informal basis.

During the years in issue, Mr. Weber received the following payments from Mobil Oil Company:

<u>F/Y/E 6/30</u>	<u>Amount</u>
1963	\$43,274.10
1964	35,673.56
1965	51,703.17

The foregoing amounts were reported by Mr. Weber on his federal income tax returns for the years in which they were received by him, and were taxed at rates comparable to or higher than the corporation would have paid on the same income. However, the Internal Revenue Service on the assessment attributed these amounts to the corporation and taxed them a second time on the theory that they were "earned" by the corporation and not by Joseph C. Weber individually.

What the corporation has done to earn these commissions the Internal Revenue Service has not disclosed. Mr. Weber has always done the buying for the business, has done so with great skill, and has earned the commissions. He has earned them not from Joseph C. Weber, Inc., but from the Mobil Oil Company by

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assuring to Mobil a steady flow of orders from an important Niagara Falls customer. This was a right or perquisite which Mr. Weber enjoyed before the taxpayer was organized, and there is certainly no impropriety in his continuing to enjoy it nor any rule of law which would compel him to transfer to the corporation every contract or other asset which had been used by or in connection with the proprietorship. See Moke Epstein, Inc., 29 T.C. 1005, 1010-11 (1958):

"Respondent contends that the writing of automobile insurance was an integral part of petitioner's business; and that, since Epstein was the president of petitioner and the policies, except in the case of renewals, were written on cars sold by petitioner, the agency commissions which were paid to Epstein by the insurance company should be charged to the petitioner. We do not agree."

\* \* \*

"This Court and others have recognized in numerous cases, that segments of what might have been an integrated business may be handled by separate taxpayers; and that the income of such separate taxpayers should not be combined for income tax purposes."

Alabama-Georgia Syrup Company, 36 T.C. 747 (1961) is decisive of this issue. Louis and Katherine (brother and sister) and their family owned all of the stock of the syrup company ("Alaga"). Louis arranged for the appointment of Katherine as broker for certain suppliers from whom Alaga purchased substantial amounts of sugar and other raw materials. Alaga continued to order supplies directly from the suppliers, who issued brokerage checks payable to Katherine and deposited in her account. The

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Treasury determined that Alaga realized purchase discounts or brokerage commissions in the amount of the fees paid to Katherine and that such amounts were distributed to her as dividends.

Rejecting this finding, the Tax Court stated (p. 767):

"Respondent argues that Katherine rendered no services to Alaga for the receipt of the brokerage fees. Even if we assume that Katherine never rendered any services to Alaga, it does not follow that the payments of the brokerage fees were in substance made to Alaga. Since the brokerage fees were paid by various suppliers from whom Alaga purchased materials, Katherine's services, if any, should have been rendered to the suppliers. Since Alaga continued to purchase from the suppliers that Katherine represented and purchased from several additional suppliers who appointed Katherine broker and from whom it had not purchased supplies while Richardson was broker, Katherine at least rendered sufficient services to the suppliers to keep or obtain Alaga as a customer. It is a fair inference that Louis directed business to suppliers for whom Katherine was broker, but this fact does not require a conclusion that the income from the brokerage commissions was in substance that of Alaga."

It is respectfully submitted that the right to the Mobil Oil commissions was the property of Mr. Weber; that this property was never transferred to or acquired by the corporation; that Mr. Weber earned these commissions by placing orders with Mobil Oil Company; and that there is nothing to support the Internal Revenue Service assessment finding that the commissions were in substance "earned" by Joseph C. Weber, Inc.

In the alternative, the Mobil Oil commissions should be considered as additional compensation paid to Joseph C. Weber as

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it would be reasonable compensation for Mr. Weber and the Internal Revenue Service should have so considered it.

The cases hold that what is reasonable compensation is a question of fact and depends upon the skill and experience of the employee, the history of his compensation over a period of time, the success of the business and the extent to which such success is attributable to his efforts, and many other factors. In a case in which the employee had built up a business from nothing in 1932 to a \$4,000,000 enterprise in 1955, the United States Court of Claims stated in Gordy Tire Co. v. U.S., 296 F. 2d 476, 477 (Ct. Cl. 1961):

"The Commissioner of Internal Revenue was required to allow what plaintiff had deducted unless it was clear that the salaries were unreasonable. In the ordinary business the people connected with it are in the best position of anyone to know what salary was reasonable and what was not; and the Commissioner of Internal Revenue is not justified in setting aside their judgment unless he is convinced it is without foundation."

Joseph C. Weber, a life long resident of the Niagara Falls area, is 59 years of age. More than forty years ago he got his start in the fuel business as a bookkeeper and office manager of Maloney Coal Company. After ten years with Maloney Coal he went to work as a sales representative for Simon Oil Company, Inc., one of the taxpayer's principal competitors. Mr. Weber worked for Simon Oil through the depression and war years, 1936-1945, and considers that he got his business education there. Thus he had had about

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ten years "inside" experience and about ten years "outside" experience in the fuel business.

In May of 1945, Mr. Weber left Simon Oil with a determination to start his own business. He started as a sole proprietor working out of his cellar. At that time, the war was still raging and oil was severely rationed. Sales for the first full fiscal year ended June 30, 1946 were only 735,000 gallons. This was about one-tenth of the gallonage sold in recent years. However, by virtue of a tremendous effort, Mr. Weber succeeded in increasing the total gallonage sold every year without exception to a level of 8,053,000 gallons in 1956.

Since he began business with a very limited payroll and had himself been a sales representative for Simon Oil, Mr. Weber was initially responsible for 100% of the business. He worked (and still works) almost around the clock, reporting every morning at 8 o'clock and going out almost every evening to follow up sales leads. During the heating season Mr. Weber routinely worked (and still works) Saturdays and very often on Sundays and holidays, responding willingly to the many calls which he would receive from customers at the office and at his home. In the last few years, Mr. Weber has passed most sales leads along to the salesmen but he is still probably responsible, directly or indirectly, for over 75% of the business.

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Mr. Weber is one of the leading and highly respected businessmen of the Niagara community. He is a member of the Niagara Club (a customer of the taxpayer), Niagara Falls Country Club, LaSalle Yacht Club, Knights of Columbus, Rotary, the Advisory Board for the Niagara Area offices of Marine Midland Trust Company of Western New York, the Gyro Club, St. Vincent de Paul Society and other organizations. In 1960 Niagara University (another customer of the taxpayer) awarded him an honorary doctorate. Wherever he goes he is alert to opportunities to boost Weber Oil Company.

Consider for a moment what position the business would be in if Mr. Weber were an unrelated party who threatened to quit unless his salary requirements were met. Remembering his experience, ability and integrity, as well as his hold over a substantial portion of the company's sales, can there be any question that an independent board of directors would willingly pay him substantially more than the aggregate of \$84,000 which he was paid as salary and commissions in 1963, the \$87,000 which he was paid as salary and commissions in 1964 and the \$103,000 which he was paid as salary and commissions in 1965? During those years and throughout the corporate existence of the taxpayer, the services performed by Mr. Weber were indispensable to the business and it would have been difficult or impossible to replace him.

The Internal Revenue Service apparently took the position that Mr. Weber had been paid an aggregate somewhat less in 1961

and 1962 and that there had been no showing of increased responsibility or other circumstances sufficient to justify the increases that were granted in 1963, 1964 and 1965. This, of course, begs the question: Were the salaries paid in the earlier years "reasonable" in view of the services which Mr. Weber had rendered to the taxpayer, or were such salaries less than the maximum amount which could be considered reasonable compensation during those years? This requires an analysis of the compensation paid to Mr. Weber over a longer period of time than the three years now in issue and the two preceding years.

As is very common with closely held and informally operated businesses, there has never been a written employment contract between Mr. Weber and the taxpayer. However, when the business was incorporated on August 5, 1949, James W. Heary, C. P. A., prepared a compensation formula which was then considered to be reasonable. This formula, expressed in terms of percentages of gross sales, was as follows:

6-1/2% on the first \$400,000  
10% on the excess over \$400,000

Although, because of the needs of the business, Mr. Weber has drawn over \$700,000 less than the full amount to which he would have been entitled under this formula, it has been kept in mind by him and by Mr. Heary in determining his compensation each year. It is unreasonable for the Internal Revenue Service to try to hold Mr. Weber to a lower level in spite of the fact that the

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taxpayer's sales doubled from 1950 to 1963; in spite of the fact that Mr. Weber was primarily responsible for these increases in sales; in spite of the fact that Mr. Weber was gaining in experience and business skills during this period; in spite the fact that inflation was eroding the true worth of his compensation. Thus, not only did the corporation's income increase every year in spite of the increase in salary but the net profit for the period also increased. No well managed business expects this sort of performance to go unrewarded.

Nor have the other key employees gone unrewarded. Casimir Tomaszewski, the office manager, and Edward Hird, the service manager, have received increases as follows in the last four calendar years:

	<u>1962</u>	<u>1963</u>	<u>1964</u>	<u>1965</u>
Tomaszewski	\$15,960	\$18,795	\$20,800	\$23,618
Hird	10,542	11,530	11,405	13,168

These are substantial salaries, but not unreasonable in view of the efforts which management expects of key people. Cf. Standard Asbestos Manufacturing Company v. Commissioner, 276 F. 2d 289 (8th Cir. 1960), in which each of three brothers in control of the business drew \$60,000 per year and the court commented:

"It is to be noted that while the salaries here contested represented a very high percentage of net income in the taxable years, the salaries of other officers remained relatively unchanged. No other officer received more than \$9,000.00 during the years in question."

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In addition to the foregoing the taxpayer has a profit sharing plan in which these employees participate.

In considering the reasonableness of Mr. Weber's compensation, the uniqueness of his services and abilities must be weighed. But for the services performed by Mr. Weber, the taxpayer would be without a substantial portion of its profits and certainly would not have the benefit of the Mobil Oil business. This is not unlike the situation of an inventor being paid for his unique ability and should, accordingly, be an allowable deduction. Appleton Electric Co., 26 TCM 1043 (1967).

In the alternative, the Mobil Oil commissions should be considered bonuses paid to Joseph C. Weber as the total of such bonuses plus salary does not exceed reasonable compensation for the services performed by Mr. Weber. The Internal Revenue Service should have so considered it as an allowable deduction. Thus, even where bonuses were seven times as large as the employee's annual salary they were allowed. Steiden Stoves, Inc. v. Glenn, 94 F. Supp. 712 (W.D.Ky 1950). Mr. Weber, being the sole shareholder of the taxpayer, the holding of L. R. Schmaus Co., Inc. v. Commissioner, 406 F. 2d 1044 (7th Cir. 1969) that the action of the sole shareholder binds the corporation for the purpose of bonuses and their deductibility, is here controlling.

Mr. Weber having worked long hours and having performed all the conventional duties involved in operating the taxpayer and its success being primarily due to Mr. Weber's

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efforts, the bonus arrangement was reasonable, particularly when it was made. It was not put into effect only when a profitable year was predictable but in all years and not at the end of the year only. See W. R. Vermillion Co., Inc. v. U. S., 283 F. Supp. 350 (W. D. Mo. 1968).

In view of the foregoing, it is submitted that the Internal Revenue Service erred in disallowing any part of the Mobil Oil commissions as compensation to Mr. Weber. There are cases in which far larger increases have been sustained. See The Mak Construction Company, ¶45,342 P-H TC Memo (300% increase as result of salary plus 5% of gross sales); Drilling and Service, Inc., ¶56,272 P-H TC Memo (increase from \$13,000 to \$51,000 to \$96,000); Hammond Lead Products, Inc., T.C. Memo 1969-14 (increase from \$61,000 to \$90,500). There is nothing in the tax law or in business practice which would require an indispensable executive to freeze his compensation at its 1950 level. Mr. Weber is not only the founder of the business, he is the president, general manager, buyer and salesman. He has had 40 years of experience in the fuel business. He is responsible for the taxpayer's source of supply and the greater part of its accounts. He raised this business from infancy during the last months of the war, guided it through the competitive struggles with other fuel oil companies and with natural gas in the 1950's and 1960's, and is making a determined effort to maintain its volume and diversify its business. He has the personality, the integrity

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and the business accumen which are essential to the taxpayer's success. Yet in spite of this record of achievement, Mr. Weber has voluntarily declined substantial compensation to which the August 5, 1949 formula would have entitled him. See Universal Steel Co., 5 T.C. 627, 636 (1945). It is respectfully submitted that the compensation, including the Mobil Oil commissions, which he received during the three years now in issue was not only not excessive but was conservative in amount and should not be disturbed.

In conclusion, it is respectfully submitted that the claim for refund should be allowed in all respects.

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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JOSEPH C. WEBER, INC.,

Plaintiff, Civil Action No. 1970-4

v.

UNITED STATES OF AMERICA,

STIPULATION OF  
UNCONTESTED FACTS

Defendant.

---

IT IS HEREBY STIPULATED by and between the parties, through their respective counsel, that for the purposes of this action the following facts herein set forth are to be taken as true and correct in the same manner as if they were duly proved; provided, however, that either party may introduce other and further evidence not inconsistent with the facts herein stipulated.

JURISDICTIONAL FACTS

1. This is a civil tax refund suit begun by the plaintiff, Joseph C. Weber, Inc., against the United States of America to recover the sum of \$82,154.13, plus interest.
2. The plaintiff is a corporation organized under the laws of the State of New York. The defendant is the United States of America.
3. The plaintiff corporation filed timely federal income tax returns for each of its fiscal years ending June 30, 1963, June 30, 1964, and June 30, 1965.

4. Timely assessments were made by the Commissioner of Internal Revenue against the plaintiff corporation for each of the years in suit.

5. On or about June 12, 1969, timely claims for refund were filed by the plaintiff for each of the years in suit.

6. On January 7, 1970, the complaint herein was filed in this Court.

#### FACTS OF THE CASE

7. The plaintiff is a corporation and was incorporated in the State of New York in 1949. The plaintiff corporation also uses the name Weber Oil Company to conduct its business.

8. The plaintiff corporation filed its Federal Income Tax Returns for the year on the fiscal year basis. The end of the plaintiff's fiscal year was June 30th.

9. During each of the three fiscal years ending June 30, 1963, June 30, 1964 and June 30, 1965, the officers and stockholders of the plaintiff corporation were as follows:

(a)	President and Treasurer	Joseph C. Weber
	Vice-President	Kathryn Q. Weber
	Secretary	Casimer Tomaszewski

(b) Joseph C. Weber held 99% of the stock of the plaintiff corporation and Kathryn Q. Weber held 1% of the stock.

10. The plaintiff corporation was and is in the business of acquiring and selling fuel oil to customers in the area of Erie and Niagara Counties in the State of New York.

11. The fuel oil sold by the plaintiff corporation to its customers during the years in suit was acquired from the Mobil Oil Company, a division of Socony Mobil Company, Inc.

12. The Mobil Oil Company paid a commission directly to Joseph C. Weber, individually, on fuel oil purchased by Joseph C. Weber, Inc., doing business as Weber Oil Company from Mobil Oil Company.

13. During the years in suit, the Mobil Oil Company paid directly to Joseph C. Weber, individually, the following amounts with respect to fuel oil sold by the plaintiff corporation:

1963	\$43,274.10
1964	35,673.47
1965	51,703.17

14. The commissions paid by Mobil Oil Company were not paid to the plaintiff nor reported on the federal income tax returns of the plaintiff, Joseph C. Weber, Inc., but were reported on the income tax returns of Joseph C. Weber, individually, and the tax thereon was paid by him.

15. The plaintiff corporation paid and deducted the following amounts of compensation paid to Joseph C. Weber, as president and treasurer of the plaintiff, for each of the years in question:

1963	\$41,000
1964	52,000
1965	52,000

PROCEDURAL MATTERS

16. The questions to be decided by the jury in this case are:

(a) Whether commissions received by Joseph C. Weber directly from Mobil Oil Company were also properly includible in the income of the plaintiff corporation for its fiscal years ending June 30, 1963, June 30, 1964, and June 30, 1965, on the grounds that the commissions were actually earned by the corporation.

(b) If the commissions are determined to be also properly includible in the income of the plaintiff corporation, whether the plaintiff corporation may deduct the commissions paid as additional compensation paid Joseph C. Weber.

(c) If the commissions are determined to be also properly includible in the income of the plaintiff corporation, what would have been the aggregate compensation for Joseph C. Weber for each taxable year.

17. The parties agree that the amount of refund, if any, shall be computed by the Internal Revenue Service, subject to approval by plaintiff's counsel and in the event of a failure to agree, the matter shall be determined by the Court.

1-22-72

Date

RAICHLE, BANNING, WEISS & HALPERN

By *Carl L. Halpern*

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Buffalo, New York 14203  
Telephone: (716) 852-7587

February 3, 1972  
Date

Attorney for Defendant  
C. DONALD O'CONNOR  
Acting United States Attorney  
Western District of New York

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1 PROCEEDINGS: November 4, 1975, 10:15 a.m.

2 APPEARANCES: As before noted.

3

4 THE COURT: We are ready to select a jury in  
5 Joseph C. Weber against United States,  
6 Civil Number 1970-4.

7

8 (Plaintiff's Exhibits Numbered 1  
9 through 7, inclusive and respectively,  
10 marked for identification.)

11

12 (A jury of twelve was duly examined,  
13 impaneled and sworn.)

14

15 (One alternate juror was duly  
16 examined, impaneled and sworn.)

17

18 (Jury escorted from the courtroom.)

19

20 THE COURT: Mr. Raichle and Mr. Jones, was  
21 there something you wanted to take up with  
22 me before we started?

23 MR. JONES: Yes, I have something, your Honor.

24 Some time ago, we moved to amend the  
25 stipulation in this case by substituting

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1 for the word "commission", the word  
2 "payments". Judge Henderson denied the  
3 motion without prejudice, I gather, to  
4 bringing it up again at trial or at least  
5 trying to put in proof consistent with  
6 our theory of the case. Our theory of the  
7 case is that these are payments and not  
8 commissions. Our position is that a  
9 commission implies that Weber was an agent  
10 of Mobil and that is not our theory of the  
11 case. We do not contend or believe or  
12 understand that plaintiff was an agent  
13 of Mobil when he received these payments  
14 and consequently, we think the word  
15 "payment" should be used throughout the  
16 stipulation and, of course, it can be  
17 characterized and argued as commissions  
18 or otherwise, but for purposes of the  
19 stipulation, I prefer the neutral word.

20 MR. RAICHLE:

May I be heard on that?

21 THE COURT:

Mr. Raichle, you may be heard.

22 MR. RAICHLE:

23 This is not only astonishing, but  
24 surprising to me. This stipulation is  
25 one on which I firmly rely and I say  
without hesitation so that counsel can be

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1 informed it is my theory of the case that  
2 this stipulation will be offered by me to  
3 make my prima facie case. A stipulation-

4 THE COURT:

5 Let me ask you, Mr. Raichle, Mr.  
6 Jones; Judge Henderson was, - this case  
7 was on his docket and so he, of course,  
8 was familiar with what has gone before  
9 and I am not, but evidently, the stipula-  
10 tion which I have before me, which was  
11 filed on February 4, 1972 is signed by Mr.  
12 O'Connor, C. Donald O'Connor, who, at that  
13 time was the Acting United States Attorney  
14 for the Government and by Ralph Halpern,  
15 a member of Mr. Raichle's firm. This,  
16 I take it, I trust, was arrived at by the  
17 parties after some discussion, after  
18 looking at various records, after very  
19 thoughtful consideration of the termin-  
20 ology to be used there and furthermore, I  
21 suppose, Mr. Jones, that you made an argu-  
22 ment to Judge Henderson similar to the  
23 argument that you are making to me. In  
24 the ordinary case, if we have a stipulation  
25 of fact, we cannot, - you know, that is  
it. I mean, certainly, if Mr. Raichle

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1 agreed that we could use another word  
2 here that would be simple because then it  
3 is a stipulation, but if he says, "Judge,  
4 I object", I cannot change the words used  
5 in the stipulation. If, for some serious  
6 reason, a misrepresentation of fact or  
7 let us say some - -

8 MR. RAICHLE: Fraud or overreaching conduct.

9 THE COURT: Misconduct, outrageous misconduct on  
10 the part of the person who signed the  
11 stipulation for the Government, that Mr.  
12 O'Connor had no authority to act or some-  
13 thing like that, then I think we could  
14 reopen, but otherwise, it seems to me that  
15 when these stipulations are worked out in  
16 detail, especially in a case like the  
17 cases like you have, Mr. Jones, because  
18 this is your stock in trade. You deal in  
19 stipulations. If I had a pro se litigant  
20 in here who wasn't carefully advised, then  
21 maybe I ought to think more carefully  
22 about this business.

23 MR. RAICHLE: I make the - -

24 THE COURT: I think the burden is on Mr. Jones,  
25 Mr. Raichle.

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1 MR. RAICHLE:

2 I make the further representation to  
3 your Honor and I am prepared to prove it  
4 that the stipulation as proffered to us  
5 contained the word "commission", and that  
6 the word originates with the Government,  
7 not with us and that the negotiations for  
8 this stipulation were, as you say,  
9 thoughtfully conducted on both sides and  
10 it is relied upon. Just think what we are  
11 doing. We are dealing with 1963, 1964  
12 and 1965 with respect to transactions  
13 which had their origins years before that  
14 and were continued during the years I just  
15 mentioned. Now then, it is because the  
16 stipulation was entered into that certain  
17 discovery was not conducted by us. It is  
18 because the stipulation was entered into  
19 and is relied upon that we don't have  
20 certain witnesses here. This is no time  
21 to bring up something like this. My  
22 purpose offering the stipulation, it is  
23 my position without reservation that that  
24 makes my prima facie case and I may or  
25 may not call witnesses on the subject.  
I don't see how, under any circumstances

1 the stipulation can be amended, repudiated, -  
2 I don't mean to use a harsh word, Mr.  
3 Jones, at this juncture or at any juncture  
4 during the trial. I think it is conclusive.

5 MR. JONES: May I make some comments, your Honor?

6 THE COURT: Yes, certainly.

7 MR. JONES: First, I don't think that Mr. Raichle  
8 can show that he was prejudiced by the  
9 change of this word. As a matter of fact,  
10 one of the issues in the stipulation is  
11 whether the commissions, the term I wanted  
12 to use was payments, - this is on Page 4,  
13 received by Joseph C. Weber, directly from  
14 Mobil Oil Company were also properly in-  
15 cludable in the income of the plaintiff  
16 corporation for its fiscal years ending  
17 June 30, '63, '64 and '65 on the grounds  
18 that the commissions were actually earned  
19 by the corporation, so I think that the  
20 very terms of this issue in the stipula-  
21 tion leaves that matter open; who earned  
22 them. Was it the corporation or was it  
23 Mr. Weber acting independently from the  
24 corporation so I don't see how Mr. Raichle  
25 can say he is prejudiced by the word

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1 "payments" being used, and secondly, I  
2 would like to hand to the Court a copy of  
3 the case Stavroudis vs. United States in  
4 the Second Circuit, where the Court allowed  
5 a stipulation to be changed where it was  
6 made clear sometime in advance of trial  
7 that the United States wanted to change  
8 the stipulation to add another issue and  
9 the Court allowed it and the Court of  
10 Appeals said that there was no prejudice  
11 against the taxpayer and upheld the  
12 Court's action in permitting the stipula-  
13 tion to be amended.

14 MR. RAICHLE:

No, but the point about it - -

15 THE COURT:

16 Will you hand that up, please, Mr.  
17 Jones. Mr. Jones and Mr. Raichle, I will  
18 hear you, but I want to find out something.  
19 As I understand it, Mr. Raichle tells us  
20 that this stipulation was prepared after,  
21 I suppose, some talk by the Government.  
Is that correct?

22 MR. JONES:

That is correct.

23 THE COURT:

24 And then it was sent on for signature  
after the Government prepared it.

25 MR. JONES:

That is also true and it was prepared

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1 with my understanding that the commission  
2 was a payment made from one person to  
3 another and - -

4 THE COURT:

All right. Let me ask you this, Mr.  
5 Jones; when you went to Judge Henderson  
6 and then Judge Henderson heard your argu-  
7 ment and he denied the same relief you are  
8 asking for now, is that true?

9 MR. JONES:

Yes, he did.

10 THE COURT:

All right. Judge Henderson then  
11 died in February, 1974 and shortly after  
12 that you were aware that this then came  
13 onto my calendar, is that right?

14 MR. JONES:

That is correct.

15 THE COURT:

All right. Then, if memory serves  
16 me correctly, I believe that in the  
17 summertime, I think it was in 1974 that you,  
18 and I don't know if Mr. Raichle was here,  
19 but somebody from his firm was here, Mr.  
20 Stephens or maybe somebody else and we had  
21 a meeting or two about this case.

22 MR. RAICHLE:

That is correct.

23 MR. JONES:

That's right. I think that was  
24 ? <sup>June</sup> December of '75.

25 THE COURT:

At least it was several months ago

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1 when we had a meeting and we talked about  
2 I was trying to get you to settle and, of  
3 course, there was a big issue involved and  
4 then we talked about possible trial time  
5 and we had some dates to set for trial.  
6 You knew at that time that you had made  
7 this motion to Judge Henderson and he had  
8 denied your motion and you knew at that  
9 time that the stipulation was here as part  
10 of the record in this case, is that right?

11 MR. JONES:

I certainly was aware of that, your  
12 Honor. Whether I specifically thought  
13 about it at that point or not, I can't  
14 say.

15 THE COURT:

Of course, this has been your file  
16 all along.

17 MR. JONES:

That's right.

18 THE COURT:

All right. The question then is if  
19 this was an important matter to you, why  
20 did you not make the motion at that time  
21 so if the Court granted the motion that  
22 that would give plaintiff an opportunity  
23 to change his strategy as far as trial  
24 was concerned.

25 MR. JONES:

If I had thought that this required

1 plaintiff to change strategy, your Honor,  
2 I would have reconsidered even filing the  
3 motion.

4 THE COURT:

Mr. Jones, this is either a matter  
5 of importance to you and to the issues in  
6 this case, or it is not important. Is  
7 that right?

8 MR. JONES:

That's right.

9 THE COURT:

If it is important and I trust it is,  
10 otherwise you wouldn't make the motion, -  
11 it is important.

12 MR. JONES:

It is important to me to change it,  
13 yes, your Honor.

14 THE COURT:

If it is important to you to change  
15 it, then you would also assume that it  
16 would be important to the other side, I  
17 suppose.

18 MR. JONES:

I can't speak for them, your Honor.  
19 I don't understand why this would affect  
20 their presentation.

21 THE COURT:

I can assume, I believe, and it is  
22 not an unfair assumption to say if it is  
23 important for you then it is certainly  
24 going to be important to the plaintiff in  
25 this lawsuit and I believe that if this is

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1 something which you thought was important  
2 and urgent, you should have made it well  
3 before the impanelment of the jury in this  
4 case. I will read. I will look at the  
5 Stavroudis case which you have handed up  
6 to me.

7 MR. JONES: I didn't give that cite to Mr.  
8 Raichle or Mr. Stephens, your Honor.

9 THE COURT: All right. It is 309 Federal Reporter  
10 2d 480.

11 MR. RAICHLE: 309 F2 4 what?

12 THE COURT: 480.

13 MR. RAICHLE: Thank you.

14 MR. JONES: One more thing, your Honor. I think  
15 that Judge Henderson's opinion indicated  
16 that the matter could be brought up again  
17 at trial and that's why I bring it up now.

18 MR. RAICHLE: Yes, but he brings up no fact or  
19 circumstance other or different than that  
20 which was developed before Judge Henderson.  
21 I don't want to be repetitious, but a  
22 stipulation as to a proposition of law may  
23 or may not be more easily changed, but a  
24 stipulation of a material fact cannot be  
25 changed, certainly not at this juncture

1 without proof of fraud, without proof of  
2 overreaching conduct, and I am prepared to  
3 to to a hearing if we have to. I think  
4 enough has been developed.

5 THE COURT:

6 Mr. Jones, in the Stavroudis case, -  
7 it is a short case. I think it is apparent  
8 that I haven't spent a long time reading  
9 it, but in this case, Judge Feinberg who  
10 was then a District Court Judge, he  
11 permitted, - this motion was made four  
12 months before trial and at that time, the  
13 Government stated it would contend at  
14 trial that the advances were capital  
15 contributions and the losses were neither  
16 business nor non-business bad debts. When  
17 they came to the time of trial, he permitted,  
18 the trial judge relieved the Government  
19 of its early stipulation and submitted to  
20 the jury as an issue of fact for its de-  
21 termination whether the advances were  
22 capital contributions or were bonafide  
23 loans, so that in that case, they didn't  
24 change the facts in the case. He just  
25 changed the questions which were going to  
be put to the jury and furthermore, the

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1 Court says that appellants do not show  
2 that the merits of their case were  
3 prejudiced in any way by this act of the  
4 trial Court. I believe that since we have  
5 had the stipulation which has been in  
6 force here in this case since February of  
7 1972, that it would, at this late stage,  
8 be completely unfair to the plaintiffs to  
9 permit an amendment of it by Court order  
10 and I refuse to do it, so I deny your  
11 motion.

12 MR. JONES:

Has the Court ruled in effect that  
13 this creates a prima facie case as Mr.  
14 Raichle states for the plaintiffs?

15 THE COURT:

I am not going to take any ruling on  
16 that now. I think that that is premature.

17 MR. JONES:

Very good.

18 THE COURT:

We have to listen to the evidence.  
19 We will take a recess of probably about  
20 ten minutes and then begin.

21  
22 (Recess taken at 11:20 a.m.)

23 \* \* \* \* \*

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1 as carefully to the cross examination of  
2 the witnesses as you do to the direct  
3 examination. Certainly, give Mr. Raichle  
4 and Mr. Jones equal attention and the  
5 same careful thought and consideration,  
6 so at this time, we will now hear the  
7 opening remarks of counsel. Mr. Raichle.

8 MR. RAICHLE:

Your Honor, ladies and gentlemen,  
9 I will try to simplify a case which at  
10 first blush may seem a little complicated  
11 to you. In the last analysis, it isn't  
12 complicated.

13 . As has been said to you, this is an  
14 action by a corporation that is a close  
15 family corporation to recover taxes paid.  
16 As his Honor explained to you, if you have  
17 a tax dispute with the Internal Revenue  
18 Service after you have filed your return  
19 and the agent comes around and looks through  
20 your papers and documents and so forth,  
21 you have two courses open to you. If he  
22 has increased the assessment and charged  
23 you with more tax than your returns show,  
24 you may appeal his findings to the Tax  
25 Court. That is not this Court. That is

1 another court, Tax Court set up within the  
2 Treasury Department, or you may pay the  
3 tax and then sue in this court to have it  
4 determined whether you really owed or  
5 whether the Internal Revenue Service and  
6 its agents were wrong in assessing you  
7 such original, - such additional amounts.

8 Now, Mr. Weber's company chose the  
9 latter course, paid the tax, \$82,154 for  
10 this three years in question and now sub-  
11 mits to this Court and you as a very  
12 important part of it, the question of  
13 whether he really, or the corporation really  
14 owed this additional amount of money.

15 First, what is Weber, Incorporated  
16 or Joseph Weber, Incorporated. It is, as  
17 I say, a close family corporation like  
18 any one of you might have, like one any-  
19 body else might have to conduct business  
20 in preference to conducting it as an  
21 individual.

22 Now, who is Mr. Weber? Well, he  
23 sits here, the gentleman closest to the  
24 aisle, the furthest away from you of the  
25 two who are sitting there. Mr. Weber,

1 as has appeared from the examination of  
2 jurors, lives in Niagara Falls. He  
3 started out as a young man, worked hard  
4 all his life. First he worked for some-  
5 thing called the Maloney Coal Company,  
6 going back thirty years or more, and then  
7 he worked for something called the Simon  
8 Oil Company for some ten years or more  
9 and then he had the desire that drives  
10 so many of us to have his own business so  
11 he struck out for himself, so to speak,  
12 in the heating oil business.

13 Now, this case doesn't involve the  
14 sale of gasoline or other oil products.  
15 It is related exclusively and more narrowly  
16 to the home heating oil business and in  
17 the course of time, in or about 1949, he  
18 organized this plaintiff, the entity which  
19 is doing the suing here and commenced to  
20 buy oil from one or more of the major,  
21 so to speak, and resell it to the home  
22 customer and shortly, prior to that time,  
23 he had also been engaged in selling oil  
24 himself personally on a commission basis.

25 Well, by dint of hard work, the

1 business of the Weber Corporation, I call  
2 it, - Joseph C. Weber, Incorporated, so  
3 when I refer to the "Corporation", that  
4 is what I am talking about, under Mr.  
5 Weber's guidance began to grow in size and  
6 accumulate more and more customers. Now,  
7 there is one thing about the heating oil  
8 business that you may know from your  
9 general knowledge, but which is of some  
10 moment, the homeowner who buys the heating  
11 oil isn't particularly concerned with the  
12 brand as long as it is a good one. Most  
13 of us, - I don't know whose heating oil  
14 we have at home. The wife claims I don't  
15 even know whether we buy oil or gas, but  
16 I think it is oil.

17 At any rate, Mr. Weber, - the company  
18 now, the Corporation would buy its oil  
19 at one price and sell it at another price  
20 to the homeowner. He, on the other hand,  
21 was selling some oil on a commission  
22 basis personally and when you organize a  
23 corporation, you don't have to turn over  
24 to the corporation all your business. You  
25 reserve some for yourself and turn over

1 the rest to the corporation and in the  
2 course of events, Mobil Oil Company, by  
3 whatever its correct name is, was paying  
4 Mr. Weber personally a commission for the  
5 sale of its product and he made a deal with  
6 Mobil whereby he was to get a commission,  
7 a typical business transaction. Those  
8 of you who have had contact with sales  
9 know that a conventional way of compensat-  
10 ing the salesman is to pay him a commission.  
11 Nothing could be plainer than that, and  
12 back in the early 60's, this starts and  
13 it continues through '62, '63, '64 and '65.

14 Now, the years that we are concerned  
15 with here, - you are concerned with, are  
16 taxes for the years 1963, 1964 and 1965.  
17 Now, back in those years, conditions in the  
18 oil business were quite different from what  
19 they are now. It was, so to speak, a  
20 buyer's market. The question was who is  
21 going to buy the oil, where could you sell  
22 it. Today it is quite different. It is  
23 where can we buy it and who will sell it  
24 to us. At any rate, it was highly compe-  
25 titive and more oil than people seemed to

1 need or could use and Mobil offered to  
2 pay Mr. Weber personally a commission if  
3 he would sell their oil and logically, what  
4 does he do; he says, "Well, I will sell  
5 it to my own company", and he proceeds to  
6 sell Mobil Gas to his company, Joseph C.  
7 Weber. He owned all the stock except,  
8 I think, a fraction of a share which his  
9 wife owned and the dollar sales amount  
10 grew from, oh, I think somewhere around  
11 half a million dollars to over a million  
12 dollars, so far as the corporation is  
13 concerned. I think it got up to five  
14 thousand customers and the corporation  
15 made a profit on what it sold and Mr.  
16 Weber was paid a commission on what he  
17 sold to the Weber Oil Company for the  
18 Mobil Gas Company.

19 Now, the commissions were paid by  
20 check, sent to Mr. Weber's home made out  
21 to him personally, deposited in a bank and  
22 he paid every cent of tax that was re-  
23 quired to be paid on the commissions  
24 which he was receiving. He revealed them  
25 in his income tax returns for every year,

1 particularly '63, '64 and '65 and paid the  
2 tax. His corporation, on the other hand,  
3 filed its returns and was operating at a  
4 profit and paid every cent of tax it owed,  
5 so he paid all the tax that anybody else  
6 pays in the same bracket and for the same  
7 income. The corporation paid everything  
8 that the corporation was required to pay  
9 on the basis of its profits.

10 This isn't a case where anybody  
11 claims there was any subterfuge, any  
12 deception, any fraud, let's use the  
13 naughty word. It is a case where a man  
14 paid every cent that everybody else pays  
15 under the same circumstances and by a  
16 couple of eager beaver agents come around  
17 and they go through Mr. Weber's books and  
18 records and they go through the corpora-  
19 tion books and records and one or the other  
20 of them gets what he thinks is a pretty  
21 good idea to get some more tax out of the  
22 people who paid all the tax that anybody  
23 else pays. He says, "Well now, here  
24 Mobil calls this a commission; Weber calls  
25 it a commission and they have paid a tax

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1 on it but we have got a legal theory. We  
2 take the position that these commission  
3 payments to Mr. Weber, personally, weren't  
4 really commissions, that they were income  
5 to the corporation", and that they were  
6 what they call, - they have a happy phrase,  
7 a constructive dividend that the corpora-  
8 tion, - it is just as if the corporation  
9 had received the commissions and had paid  
10 the money to Mr. Weber as a dividend.

11 The parties to the transaction knew  
12 it was a commission but the agents want  
13 to call it something else. Well, one  
14 thing I am going to prove beyond every  
15 shadow of a doubt that this man and his  
16 company paid every dollar in tax that  
17 anybody else pays and that this is simply  
18 an attempt, an unworthy attempt, may I  
19 say, to tax him twice, into the corporation,  
20 out of the corporation as a dividend.  
21 Nobody called it a dividend until some  
22 smart aleck tax agent comes around and  
23 hits upon the phrase.

24 Now then, if the money was, in fact,  
25 a commission and if he paid, as he did,  
every dime that he owed as a tax on that

1 commission that ends this case in the  
2 sense that his assessment of \$82,000 for  
3 the three years was wrong, illegal,  
4 unlawful and he is entitled to recover  
5 it back.

6 You can see that, so the first ques-  
7 tion is, were these payments dividends,  
8 were these payments commissions or can the  
9 Government, at this late date, twelve  
10 years after the first of the events, put  
11 a different label on them, for the purpose  
12 of collecting a double tax.

13 Now, if you want to engage in the  
14 ledger domain of the tax people and say  
15 that this money that was paid as a com-  
16 mission to him personally, on which he  
17 paid a tax, really went to the corporation,  
18 then it is our claim that if you want to  
19 deal in treating things as if they were  
20 something else, then you can simply add  
21 the commissions to the salary which he was  
22 getting from the corporation and if the  
23 aggregate constitutes reasonable compensa-  
24 tion, the tax would be the same and they  
25 would have assessed him \$82,000 too much.

1 If this seems complicated, it isn't my  
2 fault. It is the imagination of these  
3 tax fellows and I don't know whether they  
4 will have the nerve to be on the stand or  
5 not, but we will have some fun if they do.  
6 This thing of calling something other than  
7 what it is is a great bit of the arsenal  
8 over there. Another tact, they usually  
9 send out some fellow with a nice person-  
10 ality, looks harmless, represents the  
11 Government and he is only doing his duty  
12 and all that sort of thing. Now, I think  
13 when we get through here that you will find  
14 that we are right about this, that this  
15 is an American court and in the tradition  
16 of American justice, listen to them just  
17 as carefully as you listen to me. Be  
18 fair to them, but be fair to us. Get out  
19 of your mind, please, that there is any  
20 element of sharkness or wrongdoing on our  
21 part. If I don't sound like a broken  
22 record, we have paid all the tax that any-  
23 body else does and all the taxes anybody  
24 should do and give us back what was taken  
25 from us illegally. In the last analysis,

1

be fair. Thank you.

2

THE COURT:

Mr. Jones.

3

MR. JONES:

May it please the Court, counsel,  
members of the jury:

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Judge Curtin and Mr. Raichle have  
already stated what the issue in this case  
is. I would like to make a couple of  
things clear before I explain what I think  
the case is all about and what I believe  
the evidence is going to show. The import-  
ant thing is that this is a suit for re-  
fund of corporate income taxes filed by  
the company called Joseph C. Weber,  
Incorporated. I may refer to it or some  
of the documents may refer to this company  
as the Weber Oil Company, but the important  
thing is this is a suit for refund of  
corporate income tax. Mr. Joseph Weber's  
personal tax liability is really not in-  
volved in this case whatsoever.

Now, the question which you are going  
to be ultimately asked to decide is whether  
or not the Weber Oil Company should pay  
income tax on certain payments which were  
made to Joseph C. Weber, the Weber Oil

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1 Company's chief executive officer and  
2 stockholder, held almost all the stock;  
3 payments made to Joseph C. Weber by the  
4 Mobil Oil Company.

5 Now, the United States Government, of  
6 course, takes the position that these  
7 amounts are includable in the corporate  
8 income of Joseph C. Weber, Inc., the  
9 Weber Oil Company, but before we get into  
10 that, I would like to explain a little  
11 bit about the corporation, the individual  
12 and the tax situations of each, because  
13 Mr. Raichle has talked about this system  
14 of double taxation and it is true, there  
15 is no question about it, we do have some-  
16 thing like a system of double taxation in  
17 this country and I have got some pictures  
18 which I think might - -

19 MR. RAICHLE:

I don't like to be unpleasant or  
20 technical - -

21 THE COURT:

Mr. Jones.

22 MR. RAICHLE:

But I object.

23 THE COURT:

24 I think we should wait for the order-  
25 ly presentation of this particular exhibit  
by witnesses.

1 MR. JONES:

Well, this isn't an exhibit, your  
2 Honor. It is just something to help me  
3 keep this clear in my mind.

4 THE COURT:

It may be appropriate perhaps in  
5 summation, but not now. I think you should  
6 just explain to the jury what you will do.  
7 You can do that in your own words or refer  
8 to the stipulation of fact, if you desire.

9 MR. JONES:

Is the Court ruling that I can't use  
10 these in my opening?

11 THE COURT:

You cannot use those in your opening,  
12 yes, and there is a reason for it, Mr.  
13 Jones, and the reason is that we have no  
14 exhibits in evidence yet, and we cannot  
15 refer to material which is not in evidence,  
16 so we will wait and see whether or not it  
17 is in evidence. If it comes into evidence,  
18 then certainly you may refer to it.  
19 Otherwise not. You may continue.

20 MR. JONES:

I don't want to mislead the Court,  
21 your Honor - -

22 THE COURT:

Please - -

23 MR. JONES:

These aren't intended to be exhibits.

24 THE COURT:

Mr. Jones, please, you may continue  
25 with your opening.

1 MR. JONES:

2 In any large corporation like Eastman  
3 Kodak or Mobil Oil Company or any company  
4 when the corporation earns income, it pays  
5 income tax upon the income that it earns  
6 and big corporations and small corporations  
7 such as Joseph C. Weber, Incorporated have  
8 stockholders and these stockholders pay  
9 income tax on the dividends that they get  
10 from the corporation so that you might say  
11 that there is something like a double tax  
12 situation in this country where money is  
13 earned by the corporation; it is taxed,  
14 taxed a corporate income tax, and when it  
15 goes to the individual stockholders they  
16 pay individual income tax. The tax which  
17 you and I, all of us pay is individual  
18 tax, and they pay tax on the dividends  
19 which they receive. <sup>that</sup> We have paid income  
20 tax since 1909. There is nothing new about  
21 this. We have had an individual income  
22 tax for just about as long and when you  
23 have corporations and individuals, this is  
24 a situation that you might say occurs.  
25 The money is taxed when it comes into the  
corporation and it is taxed when it goes

1 to the stockholder. Nothing unusual,  
2 illegal or devious about this and it is  
3 important to note that the Government,  
4 and nobody ever says that a business has  
5 to operate in a corporate form. A business  
6 can operate as an individual proprietor-  
7 ship as Mr. Weber did for several years.  
8 There are certain advantages to a corpor-  
9 ation, certain business reasons, limited  
10 liability, things like that, so that  
11 nobody requires a business to operate as  
12 a corporation.

13 Now, the important thing is that when  
14 the money is earned by the corporation, it  
15 is supposed to be taxed under the corporate  
16 income tax laws and it can't be short-  
17 circuited by having money that the  
18 corporation earns payable to a stockholder.

19 The evidence in this case, as Mr.  
20 Raichle indicated, is going to establish  
21 that Mr. Weber was in the fuel business,  
22 started out in the 1940's in the Niagara  
23 Falls area and in 1949, for business  
24 reasons, he chose to form a corporation  
25 and the years that we are concerned about

1 are 1963 through 1965 and during those  
2 years, the Weber Oil Company received its  
3 fuel oil from the Mobil Oil Company and  
4 sold it to its customers and, of course,  
5 the Weber Oil Company paid the Mobil Oil  
6 Company for the fuel that it received.

7 Now, there was an arrangement that  
8 was set up sometime in the 60's between  
9 the Mobil Oil Company and Joseph Weber  
10 and the Weber Oil Company and this can  
11 roughly be explained as follows, and I am  
12 sure we will get into this during the  
13 plaintiff's portion of the case:

14 The Mobil Oil Company paid something  
15 called a temporary allowance or a competi-  
16 tive allowance based upon the number of  
17 gallons that the Weber Oil Company  
18 purchased from Mobil so that if the  
19 Weber Oil Company bought a thousand gallons,  
20 for example, from the Mobil Oil Company,  
21 it would be, or there would be a temporary  
22 allowance of .65 cents per gallon, at least  
23 during one period covered by this case.  
24 Now, this temporary allowance, instead of  
25 being paid to the Weber Oil Company, it was

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1 paid to Joseph C. Weber and this temporary  
2 allowance, which is between thirty and  
3 fifty thousand during each of the years  
4 in suit, this is the amount which you are  
5 going to be asked to decide whether it  
6 should be includable in the income of  
7 the Weber Oil Company or not. Now, when  
8 you are listening to the evidence of this,  
9 the evidence regarding this particular  
10 issue, I would suggest you keep in mind  
11 the following; when Mr. Weber was working  
12 for the Weber Oil Company and when he went  
13 to Mobil and arrangements were made for  
14 this temporary allowance or discount,  
15 whatever you call it - -

16 MR. RAICHLE:

Commission.

17 MR. JONES:

18 Was he working independently, - Mr.  
19 Raichle refers to it as commission, - was  
20 he working independently, or was he work-  
21 ing for the Weber Oil Company. The  
22 evidence is going to show you, ladies and  
23 gentlemen, that no man can serve two  
24 masters. Mr. Weber, when he acquired this  
25 oil, when he sold it, when he dealt with  
his customers, he was acting for the Weber

1 Oil Company. That was who he was employed  
2 by. That is who he worked for and that is  
3 the corporation whose best interests he  
4 is supposed to serve and consequently,  
5 this allowance or commission which was  
6 paid by the Mobil Oil Company to Joseph  
7 Weber, was really earned by the corpora-  
8 tion and should be included in the corpora-  
9 tion's taxable income.

10 Now, Mr. Raichle has talked about  
11 some fast footwork or something like that  
12 with regard to reasonable compensation.  
13 Mr. Raichle claims that okay, if this  
14 money is earned by the Weber Oil Company,  
15 if it is supposed to be includable in the  
16 Weber Oil Company's income, then the  
17 Weber Oil Company is entitled to a deduc-  
18 tion for additional reasonable compensa-  
19 tion paid to Mr. Weber.

20 The evidence is going to show quite  
21 clearly that the corporation never intended, -  
22 Weber Oil Company never intended that this  
23 money would be paid to Joseph Weber as  
24 compensation or a salary. Mr. Weber was  
25 adequately compensated for the services

1 that he did for the Weber Oil Company.  
2 In fact, the corporate tax return is going  
3 to indicate that he spent all his time  
4 working for the Weber Oil Company and it  
5 was never intended that this money from  
6 the Mobil Oil Company was supposed to be  
7 an additional compensation to Mr. Weber  
8 for his services as chief executive officer.  
9 As a matter of fact, with regard to the  
10 reasonable compensation, the Internal  
11 Revenue Service never even questioned that.  
12 They accepted exactly what the corporation  
13 put on their income tax returns as a  
14 deduction for compensation paid to Mr.  
15 Weber, the chief executive officer, so  
16 in conclusion, as you listen to the  
17 evidence, I join Mr. Raichle in asking  
18 that you listen carefully to the evidence,  
19 whatever it is presented by both sides.  
20 I suggest you keep in mind the question  
21 can someone serve two masters, can Mr.  
22 Weber work for his own Weber Oil Company  
23 and at the same time, carry on a separate  
24 independent business of his own. Thank  
25 you.

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1 THE COURT:

2 Ladies and gentlemen and counsel, at  
3 this time, the United States Attorney has  
4 a problem and a long time ago, I arranged  
5 for a meeting with some lawyers from out  
6 of town in regard to another case and it  
7 is important that I meet with them and,  
8 therefore, because of that, we will adjourn  
9 the trial of this case now until 2:00  
10 o'clock this afternoon. As I explained to  
11 you before, do not discuss the case in  
12 the interim. Keep your minds open. Come  
13 back to the jury room a few minutes before  
14 2:00 and we will start promptly at that  
15 time. You may now go out with the Marshal.  
16 Spectators, keep your places, please.

17 (Jury escorted from the courtroom.)  
18

19 THE COURT:

20 Mr. Jones, Mr. Raichle, we will then  
21 see you at 2:00 o'clock. If you desire,  
22 Mr. Jones, you could leave your materials  
23 here with the clerk.

24 MR. JONES:

25 Thank you.

(Recess taken at 12:05 p.m.)

\* \* \* \* \*

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1 plaintiff upon trial of the case and on  
2 the witness list it states other witnesses  
3 may be called in rebuttal, but their names  
4 cannot be stated so I am under the assump-  
5 tion that Mr. Borenkind was not a rebuttal  
6 witness, but was going to testify during  
7 Mr. Raichle's case and with regard to  
8 being a rebuttal witness, I think it is  
9 very clear, your-Honor, that he can't  
10 testify as a rebuttal witness with nothing  
11 to rebut and there is nothing to rebut at  
12 this point.

13 MR. RAICHLE:

And there won't be much to rebut, if  
14 anything.

15 THE COURT:

Mr. Raichle, as I understand, you are  
16 going to call - -

17 MR. RAICHLE:

I will call the witness. I don't  
18 care what label they put on him.

19 THE COURT:

All right, fine.

20  
21 (Jury returns to the courtroom.)

22 MR. RAICHLE:

Mr. Borenkind.

1 S A M U E L H. B O R E N K I N D . (3317 Milburne Avenue,  
2 Baldwin, New York), a witness called by and in behalf of the  
3 plaintiff, having been first duly sworn, was examined and  
4 testified as follows:

5  
6 DIRECT EXAMINATION BY MR. RAICHLE:

7 MR. RAICHLE: Shall I proceed, your Honor?

8 THE COURT: Yes.

9  
10 BY MR. RAICHLE:

11 Q Mr. Borenkind, what is your, - I shouldn't say "business";  
12 what is your occupation?

13 A I am an Attorney at Law.

14 Q We are practicing a profession.

15 A My profession, my specialty is practicing within the  
16 petroleum industry.

17 Q And how long, - strike that out. Are you a member of  
18 the Bar of the State of New York?

19 A I am, sir.

20 Q Are you a member of the Bar of the United States Supreme  
21 Court?

22 A I am.

23 Q Are you a member of the Bar of the Court of Appeals  
24 for the Second Circuit?

25 A I am.

1 Q And various of the District Courts throughout the  
2 United States?

3 A That is correct.

4 Q And, sir, from what institutions have you been  
5 graduated?

6 A St. Lawrence University, Columbia University.

7 Q I see, and when did you get your law degree?

8 A 1932.

9 Q And has it developed or eventuated that you have  
10 specialized in certain branches of the profession?

11 A I have.

12 Q And what?

13 A I specialize within the petroleum industry insofar as  
14 the middle market is concerned.

15 Q What do you mean by the middle market?

16 A The jobber or reseller, the one who buys products from  
17 a refiner and resells it to other resellers and/or  
18 consumers.

19 Q Is the business of Joseph C. Weber, Incorporated,  
20 is it?

21 A It would be a middle marketer.

22 Q And you specialize in that phase of the petroleum  
23 industry?

24 A I have, sir.

25 Q And could you name some of your clients?

1 A Well, I am the attorney for the Empire State Petroleum  
2 Association.

3 Q Keep your voice up. Keep your voice up, if you will,  
4 please.

5 A I represent the Empire State Petroleum Association;  
6 The Pennsylvania Petroleum Association; Petroleum  
7 Association of Delaware; Long Island Oil Terminal  
8 Operators within the oil industry and I have acted as  
9 consultant for many other trade associations such as  
10 New England Fuel Institute, Fuel Merchants of New Jersey  
11 and others throughout the United States.

12 Q That is enough, and over how many years has this  
13 specialization of yours taken place, if you don't mind.

14 A I don't mind. Better than forty years, sir.

15 Q Now, as the years have past, have you been informed  
16 from your specialization and through your specialization  
17 of the relation of salaries of chief executives of  
18 companies, large and small, to the gross sales and  
19 net sales and other factors and figures in the industry?

20 A I have, sir.

21 Q Now, at our request have you made a study of the figures  
22 disclosed by the tax returns with respect to the gross  
23 sales of Joseph C. Weber, Inc. during the years '63, '64,  
24 and '65?

25 A I have, sir.

1 Q And have you also been informed by figures from these  
2 same sources, - that is, the tax return, - what the  
3 corporation paid in the way of a salary for each of  
4 the years?

5 A I have been so informed.

6 MR. JONES: Your Honor, before Mr. Raichle  
7 proceeds, I wonder if Mr., - if he could  
8 tender the witness.

9 MR. RAICHLE: I can't hear, I am sorry.

10 MR. JONES: I wonder if he could tender the  
11 witness if he wishes to do so as an  
12 expert and specifically what field he  
13 desires to name him and also I would  
14 like to request a short voir dire before  
15 he proceeds.

16 MR. RAICHLE: Go ahead, ask him anything you want.

17 THE COURT: Certainly, Mr. Jones, you may  
18 inquire about the background of the  
19 witness.

20 MR. RAICHLE: Go ahead.

21  
22 PRELIMINARY EXAMINATION BY MR. JONES:

23 Q Have you testified as an expert witness before, Mr.  
24 Borenkind?

25 A On several occasions.

1 Q And what type of testimony was that?

2 A All related to the petroleum industry, sir, as to  
3 valuation, as to reasonable income of the participants,  
4 the principal officers.

5 Q And can you name the cases where you did that, Mr.  
6 Borenkind?

7 A I can't, but I do recall some years back testifying  
8 in the Southern District Court, Federal. I recall  
9 appearing on behalf of certain clients of mine before  
10 the Internal Revenue Service with respect to the  
11 reasonableness of witnesses' salary.

12 Q But you weren't testifying as an independent expert?

13 A No, I was not. I was appearing as an attorney.

14 Q Are there any cases where you testified as an independent  
15 expert before a court?

16 A As to reasonable salaries?

17 Q Yes.

18 A I do not recall, sir. But I don't think I have.

19 Q Now, what is the field that you have testified as an  
20 expert, independent expert?

21 A As to the valuation of the petroleum industry, middle  
22 marketer.

23 Q Can you explain what you mean by that, evaluation of  
24 the industry?

25 A For estate tax purposes, to determine the value of the

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1           jobber upon the death of a principal stockholder.

2           We have also testified in other instances.

3   Q       Now, which case was that?

4   A       I don't recall the case, sir. I have handled many  
5           thousands of them over the years.

6   Q       Was it in a Federal Court?

7   A       It was in a Federal Court, that I do recall.

8   Q       Do you have a resume or anything of your qualifications  
9           as an expert?

10   A       Not with me, sir.

11   Q       And did you - -

12   MR. RAICHLE:                   He has got it in his mind. Ask him.

13   THE COURT:                    Mr. Raichle, one at a time, please.

14   MR. RAICHLE:                   I beg your Honor's pardon.

15

16   BY MR. JONES:

17   Q       Did you testify as an independent expert in that  
18           specific case?

19   A       Yes, I did.

20   Q       And you don't recall the name?

21   A       I do not recall the name.

22   Q       Do you remember when it was?

23   A       That must have been some fifteen years ago, sir.

24   Q       And you remember what Court it was in?

25   A       In the Federal Southern District Court, New York.

1 Q Do you remember the judge?

2 A I do not.

3 Q Now, any other instances?

4 A Well, I am appearing as a witness at the present time  
5 in the State of Tennessee where I have been examined  
6 before trial. I have not as yet appeared in the Court  
7 itself because it has not as yet been reached for trial  
8 but I am testifying in that particular proceeding in  
9 connection with the valuation of the stock between two  
10 principal stockholders taking into consideration the  
11 salaries of the remaining stockholder within the  
12 corporation.

13 Q Is that a fuel corporation?

14 A That is, sir, both heating oil and gasoline.

15 Q And you are testifying as an expert in that one?

16 A I am.

17 Q And are you comparing the reasonableness of the  
18 compensation of any of those individuals with others?

19 A In that particular case, yes sir. I can give you the  
20 name of that case because it is fresh in my mind, sir.

21 Q Fine.

22 A It is Benton Oil Service, Chattanooga, Tennessee,  
23 B-e-n-t-o-n.

24 Q But you have never testified, I take it, as an expert  
25 in the field of the reasonableness of compensation other

1           than this Benton Oil Service case?

2   A       Oh, I did some ten years back. I don't recall the  
3           name of the case, - fifteen years back.

4   Q       And was that based upon the study of statistics?

5   A       No, sir. It is based upon my experience with middle  
6           marketers in the petroleum industry, people who I have  
7           represented from time to time whose financial statements  
8           I have examined from time to time and it is based upon, -  
9           well, I would say seminars we have conducted within the  
10          industry to determine the reasonableness of salaries  
11          of principal officers.

12 MR. JONES:                    Would your Honor allow me just a  
13                               moment, please?

14 MR. RAICHLE:                 I can't hear you.

15 MR. JONES:                    I'm sorry. I just asked for a  
16                               moment to confer.

17 MR. RAICHLE:                 Oh.

18 MR. JONES:                    That is all the questions I have,  
19                               your Honor, on voir dire of Mr. Borenkind.  
20                               I would not object to his qualifications  
21                               as an expert in the petroleum or fuel  
22                               industry.

23 THE COURT:                   All right. You may continue, Mr.  
24                               Raichle.

25 MR. RAICHLE:                 Do we have a copy of that? Could

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1                                   this be marked?

2   THE COURT:                   Mr. White.

3

4                                   (Plaintiff's Exhibit Number 8

5                                   marked for identification.)

6

7   BY MR. RAICHLE:

8   Q       I show you Plaintiff's Exhibit 8 for identification  
9           and it contains six columns, - I might say seven  
10          columns. Over at the left it says 1963, 1964 and  
11          1965 and then there are headings, the next heading,  
12          "Total Gallons". Do those represent the gallons sold  
13          by or which passed through Joseph C. Weber, Inc., in  
14          the respective years?

15   MR. JONES:                   I will object to that, your Honor,  
16                                   unless, - the witness hasn't identified  
17                                   that.

18   MR. RAICHLE:                 It is taken off the income tax.

19   THE COURT:                   Mr. Raichle, evidently Mr.  
20                                   Borenkind made some studies of some  
21                                   records and I think that the objection  
22                                   is, why don't we let Mr. Borenkind explain  
23                                   what the Exhibit is.

24   MR. RAICHLE:                 All right.

25   THE WITNESS:                 I have examined the income tax

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1 returns for Joseph C. Weber, Inc., for  
2 the years in question. For the fiscal  
3 year ending 1963 his total number 2  
4 heating oil gallons sold at retail was  
5 6,590,073 gallons. In dollars his gross  
6 sales, according to the tax return, was  
7 \$1,080,338.46 and the cost of sales was  
8 \$724,904.71, thereby generating a gross  
9 profit for that year in question of  
10 \$355,433.75. For the fiscal year ending  
11 June 30, 1964 Joseph C. Weber, Inc., sold  
12 5,593,553 gallons of number 2 heating oil  
13 at retail. His dollar gross sales was  
14 \$934,036.06, while his cost of sales was  
15 \$579,602.70, thereby generating gross  
16 profits of \$354,433.36, and for the fiscal  
17 year ending June 30, 1965 the Weber  
18 Corporation sold at retail 6,374,750  
19 gallons of number 2 heating oil. Gross  
20 sales amounted to \$888,845.36. The cost  
21 of sales was \$527,432.44, thereby generat-  
22 ing gross profits of \$361,412.92.

23 BY MR. RAICHLE:

24 Q And what do the columns over on the side, the last two  
25 columns represent?

1 A Well, the next column was the salary paid to Joseph C.  
2 Weber by the Corporation as reflected by the tax return  
3 for the year '63, forty-one thousand; For the fiscal  
4 year ending June 30, '64, fifty-two thousand, and for  
5 the fiscal year ending 1965, fifty-two thousand.

6 Q Now, from - -

7 A The other column, Mr. Weber, as an individual received  
8 Mobil Oil commissions of \$43,274.10 which together with  
9 the salary paid for the year in question, total compen-  
10 sation of Mr. Weber was \$84,274.10.

11 Q On that theory of the case?

12 A For the fiscal year ending June 30, '64 the Mobil  
13 commissions to Mr. Weber, as an individual was 35,673.47  
14 and together with his salary from the corporation of  
15 \$52,000., Mr. Weber combined received a total amount of  
16 \$87,673.47. And finally, for the fiscal year ending  
17 June 30, 1965, salary paid by the corporation to Mr.  
18 Weber was fifty-two thousand. The Mobil Oil commissions  
19 generated 51,703.17, making a total compensation to Mr.  
20 Weber of \$103,703.17.

21 Q And if you took the amount paid by the corporation,  
22 Joseph C. Weber, Inc., and the amount received as commissions  
23 and in theory and hypothetically assumed that the corpor-  
24 ation received the amount designated as commissions in  
25 each year, if you added his salary and the commissions

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1 each year and for each year and had the aggregate  
2 of the two, would the aggregate be fair and reasonable  
3 compensation and in line with what executives doing  
4 similar work in the industry in those years would  
5 receive?

6 MR. JONES: Your Honor - -

7 THE WITNESS: The answer is "Yes".

8 MR. JONES: I wonder if I could just have  
9 an objection to the foundation for that  
10 question because there is no evidence  
11 in the record to show that that money  
12 was intended as compensation to Mr. Weber  
13 for his services to the Mobil Oil Company.

14 THE COURT: I will permit this.

15 MR. RAICHLE: I said hypothetically.

16 THE COURT: Hypothetically, yes. At this stage  
17 I will permit the witness to answer the  
18 question. Of course, you may cross examine  
19 and then we will consider argument at a  
20 later time.

21  
22 BY MR. RAICHLE:

23 Q The combined items, - that is, the salary and the  
24 commission in each instance would be in line with the  
25 compensation paid by others in the same industry on the

1 basis of the same assumed facts, is that right?

2 A That is correct.

3 MR. RAICHLE: You may ask.

4  
5 CROSS EXAMINATION BY MR. JONES:

6 Q Mr. Borenkind, have you ever examined the books and  
7 records of the Joseph C. Weber, Incorporated, yourself?

8 A Other than the income tax returns, the answer is "no".

9 Q Now, what records of the company did you look at, if  
10 anything, besides the income tax returns?

11 A None.

12 Q And when did you look at the income tax returns?

13 A Last week and early this morning.

14 Q Did you prepare a written summary of your conclusion?

15 A In pencilled notes, yes.

16 Q Can I take a look at that, please?

17 THE COURT: Surely.

18 THE WITNESS: You may.

19 THE COURT: Are there many sheets there, Mr.

20 Borenkind?

21 THE WITNESS: Just one.

22 THE COURT: Just one.

23 THE WITNESS: It has several memorandums there.

24 BY MR. JONES:

25 Q May I look underneath? Is there anything underneath

1 here?

2 A I don't believe there is. You may.

3 Q Now, were you aware, Mr. Borenkind, that these commis-  
4 sions were paid from the Mobil Oil Company to Joseph  
5 Weber directly?

6 A I was so told.

7 Q And they were not reflected upon the corporate income  
8 tax returns of Joseph Weber, Incorporated?

9 A They were not.

10 Q And you are assuming, by your testimony that these  
11 were, - that these commissions were additional compensa-  
12 tion to Mr. Weber, correct?

13 A I was not, sir. I was taking into consideration the  
14 amount of gallons sold at retail, middle distillate,  
15 gross profits generated and what would be the fair and  
16 reasonable salary of a principal stockholder and active  
17 participant in a heating oil business.

18 Q Well, when you, - excuse me. Did you prepare this little  
19 typewritten slip here that Mr. Raichle handed me?

20 A No, I did not prepare it.

21 Q So that - -

22 THE COURT: So there is no confusion, there is  
23 one marked.

24 THE WITNESS: That is the same as the one that  
25 was marked.

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1 THE COURT: Evidently, someone made a copy?  
2 THE WITNESS: Yes, of Exhibit - -  
3 THE COURT: Why don't you compare the two, Mr.  
4 Jones, and if they are the same, let us  
5 use the exhibit which is marked.  
6 MR. RAICHLE: Here it is.  
7 THE WITNESS: Here is the exhibit. Mr. Raichle has  
8 it.  
9 THE COURT: Mr. Raichle has it. Let us use the  
10 one that was marked.  
11  
12 BY MR. JONES:  
13 Q Now, on this Exhibit P8, there is a column on the extreme  
14 right saying, "Total compensation to Joseph Weber".  
15 You didn't put those words in there, I take it, did you?  
16 A No, I did not.  
17 Q You took the compensation which was paid to Mr. Weber  
18 from the corporate tax return, correct?  
19 A I examined the corporate tax return and I saw the figures  
20 there, but I didn't take them. I examined the tax return,  
21 yes.  
22 Q You didn't extract the figures yourself?  
23 A No, I did not, not according to my computations.  
24 Q These were extracted for you then by Mr. Raichle or Mr.  
25 Stephens?

1 A That is correct, sir.

2 Q Now, can you explain to me what, - is there any connec-  
3 tion between the yellow sheet here and this exhibit  
4 P8, any of those figures show on the - -

5 A Yes. According to my computations reflected in Exhibit  
6 P8, are your gross sales of a million eighty thousand  
7 three hundred thirty-eight dollars and forty-six cents  
8 which represents gross sales and reflected in my figure,  
9 are the cost of sales of 724,904.71. However, not  
10 reflected in Exhibit P8 is my next figure which is  
11 your gross profits of \$355,443.75. This is my mathema-  
12 tical computation. Based upon industry practices, during  
13 the year in question, the principal stockholder, an  
14 active participant in this business, his fair and reason-  
15 able salary would have been twenty-five per cent of the  
16 gross profits generated by that business and, therefore,  
17 my figure for the year in question came up with a reason-  
18 able salary of \$88,858.00. Did you obtain any comparables  
19 upon which you base this twenty-five per cent.

20 A Mr. Jones, from experience, we recognize that people  
21 within the industry during the 60's, '63, '64, '65, the  
22 years in question, the administrative salaries of the  
23 principal stockholders active in the business was  
24 twenty-five per cent of the gross profits.

25 Q I know, but do you have any comparables or books or  
charts showing the other companies?

1 A There is no such thing available as books or charts.  
2 They do have studies made. A study was recently made  
3 of eighty-five jobbers throughout the United States and  
4 we have 30,000 jobbers throughout the United States.  
5 Your geographical area is different. Your marketing  
6 conditions are different. Primarily, in the New England  
7 States, of which New York is one, they primarily sell  
8 most of the heating oil.

9 Q You say New York is a New England State?

10 A Is one of the New England States and the New England  
11 States primarily sell most of the heating oil.

12 Q I say that is a new one on me.

13 A Well, it is, sir. I think we sell sixty per cent of the  
14 heating oil throughout the New England States.

15 Q Are you speaking of, - you mean it is in the New England  
16 territory?

17 A Yes. New York being in the New England territory and,  
18 therefore, from exposure with other middle marketers  
19 and from exposure with other jobbers in the years in  
20 question, the average reasonable salary of the principal  
21 stockholders, administrative salaries, was twenty-five  
22 per cent of your gross profits and that's how I came up  
23 with the figures stated in my memorandum.

24 Q Is that an industry-wide formula?

25 A It is an industry-wide practice for the years in question.

1 Q And do you have any kind of books or - -

2 A None available, sir.

3 Q It is just your own observations as being in the  
4 petroleum business, is that correct?

5 A That is correct, sir, so using the same formula, Mr.  
6 Jones, I came up with '64 and '65.

7 Q And are these all of the work sheets or scratch notes  
8 that you prepared?

9 A I had other scratch sheets and scratch notes, but those  
10 are my concluding mathematical computations.

11 MR. JONES: I would like to mark that as an  
12 exhibit, your Honor, and that is all the  
13 questions that I have.

14 MR. RAICHLE: No objection; mark it.

15 THE COURT: All right. Hand it up, Mr. Borenkind.

16 THE WITNESS: May I keep this?

17 THE COURT: You can keep the yellow pad, they  
18 are hard to get these days.

19 THE WITNESS: Right, sir.

20 THE COURT: Mr. White, will you mark that as  
21 a defendant's exhibit, please.

22  
23 (Defendant Exhibit Number 17 marked  
24 for identification.)  
25

1 THE COURT: Any other questions, Mr. Jones?

2 MR. JONES: May I have just one moment, please?

3 THE COURT: Surely. As I understand it, it is

4 just for identification.

5 MR. JONES: I would like to move it in, I think.

6 THE COURT: You want to move it in evidence.

7 MR. JONES: I won't move it in at this point, your

8 Honor. I think it has been identified as

9 the scratch notes prepared by Mr.

10 Borenkind.

11 THE WITNESS: Yes.

12 THE COURT: That is right.

13 MR. JONES: I won't move it in at this point.

14 THE COURT: All right.

15 MR. RAICHLE: I am not going to move, but I have

16 no objection if he wants to.

17 THE COURT: Mr. Jones, are you finished question-

18 ing the witness?

19 MR. JONES: Yes, I am.

20 THE COURT: Mr. Raichle.

21

22 REDIRECT EXAMINATION BY MR. RAICHLE:

23 Q Do you know it to be a fact that the IRS only has to

24 press a button and confirm what you have just said.

25 MR. JONES: I will object to that, your Honor.

1 THE COURT: I will sustain the objection.

2

3 BY MR. RAICHLE:

4 Q Well, that the IRS has statistics by the thousands on  
5 what executives engaged in this line of business do?

6 MR. JONES: Same objection.

7 THE COURT: Mr. Raichle, I sustain the objection.  
8 I do not think we should ask the same  
9 question in a different form.

10 MR. RAICHLE: Oh, I am sorry, your Honor. That is  
11 all.

12 THE COURT: Mr. Borenkind.

13 THE WITNESS: Thank you, Judge. Thanks very much.

14 MR. RAICHLE: That is all.

15 THE COURT: All right. Mr. Raichle, any other  
16 witness.

17 MR. RAICHLE: No. If your Honor please, I rest the  
18 plaintiff's case.

19 THE COURT: You rest. Ladies and gentlemen, there  
20 are some things I would like to talk to  
21 the lawyers about, so if you will please  
22 go to the jury room, we will have you back  
23 soon.

24

25

(Jury escorted from the courtroom.)

1 THE COURT:

Do you want to be heard at this time,  
2 Mr. Jones?

3 MR. JONES:

Yes, your Honor. I would like to  
4 move the Court, your Honor, for a directed  
5 verdict.

6 THE COURT:

Can you keep your voice up, Mr. Jones.

7 MR. JONES:

Certainly. Under Rule 51, on the  
8 grounds that - -

9 THE COURT:

Excuse me. Mr. Halpern, I don't know  
10 how that door became closed. Open the  
11 outer doors. Go ahead, Mr. Jones.

12 MR. JONES:

On the grounds that the plaintiffs  
13 have presented absolutely no evidence  
14 that these commissions were earned or rather  
15 were not earned by Joseph Weber, Incorporated.  
16 That is their first burden of  
17 proof, the first bridge they have to cross.  
18 The matter of entering in evidence various  
19 income tax returns and an expert witness  
20 who has no knowledge of the actual facts  
21 during the period in suit is not sufficient  
22 to sustain their burden and I don't think  
23 it has been shown that these commissions  
24 were not earned by Weber, Incorporated, -  
25 Weber Oil Company, and therefore, move for

1 a directed verdict on that issue, and  
2 secondly, as to the reasonable compensa-  
3 tion question, the cases cited in our  
4 brief indicate, your Honor, that if a  
5 payment is to be deductible as compensa-  
6 tion, it must have been intended as such  
7 at the time it was paid and there is just  
8 no evidence in the record again that these  
9 payments which went from the Mobil Oil  
10 Company to Mr. Weber individually were  
11 intended as compensation from the Weber  
12 Oil Company to Joseph C. Weber, the  
13 principal stockholder. There is a flock  
14 of cases cited in the Paula Construction  
15 case in our brief, your Honor.

16 THE COURT:

In which brief?

17 MR. JONES:

The trial memorandum.

18 THE COURT:

The trial memorandum.

19 MR. JONES:

And also the X-L Service tax court  
20 memo which is referred to there.

21 THE COURT:

Apparently, I have the Fed. 2d, if  
22 there is a discussion. I have it there.

23 MR. JONES:

I have copies of those tax court  
24 memos, your Honor, but I think without  
25 showing this vital point that these payments

1 were intended as compensation to Joseph  
2 Weber from the Weber Oil Company, the  
3 plaintiffs cannot now come in and say that  
4 these amounts are deductible as compensa-  
5 tion by the corporation and that is what  
6 they are trying to do in the second half  
7 of their case and I say this despite the  
8 evidence of Mr. Borenkind that the total  
9 amount, the specific, the total amount  
10 paid Mr. Weber is not unusual or reasonable  
11 in the industry.

12 THE COURT:

Are you finished, Mr. Jones?

13 MR. JONES:

Yes.

14 THE COURT:

15 So I get your argument before I  
16 listen to Mr. Raichle, the stipulation  
17 says, 12 and 13, - 12, Mobil Oil Company  
18 paid a commission directly to Joseph C.  
19 Weber individually on fuel oil purchased  
20 by Joseph C. Weber, and 13, during the  
21 years in suit, the Mobil Oil Company paid  
22 directly to Joseph C. Weber, individually,  
23 the following amounts with respect to  
24 fuel oil, so as far as the payment of  
25 monies, it went from Mobil Oil to Joseph  
C. Weber, individually.

\*

\*

\*

1 both ways and your Honor make the decision.

2 THE COURT: All right.

3 MR. JONES: Fine.

4 THE COURT: Very well. You make the proposals  
5 and we will talk about them.

6 MR. RAICHLE: Very well, sir.

7 MR. JONES: I might say, your Honor, that we  
8 don't intend to cover the reasonable  
9 compensation issue at all during our case.

10

11 (Jury returns to the Courtroom.)

12

13 THE COURT: At this time, ladies and gentlemen,  
14 Mr. Jones, in behalf of the defendant,  
15 will now call a witness.

16 MR. JONES: Mr. Goodwill, please.

17

18 M E L V I N D. G O O D W I L L (238 Hendricks Boulevard,  
19 Eggertsville, New York), a witness called by and in behalf of  
20 the defendant, having been first duly sworn, was examined and  
21 testified as follows:

22

23 DIRECT EXAMINATION BY MR. JONES:

24 Q Mr. Goodwill, what is your present place of employment?

25 A Mobil Oil Corporation.

1 Q And what address is that?

2 A 5225 Sheridan Drive, Williamsville, New York.

3 Q Keep your voice up just a little.

4 A Okay. 5225 Sheridan Drive, Williamsville, New York.

5 Q What is your position there?

6 A I am the administrative and controls manager.

7 MR. RAICHLE: I am sorry.

8 THE COURT: Mr. Goodwill, can you speak up.

9 THE WITNESS: Yes.

10 THE COURT: Make sure the gentleman out there  
11 in the spectators' area can hear you and  
12 then you will know that certainly everyone  
13 can.

14 THE WITNESS: Fine.

15 MR. RAICHLE: I didn't hear what his job was.

16 THE WITNESS: I am the administrative and controls  
17 manager.

18

19 BY MR. JONES:

20 Q How long have you worked for the Mobil Oil Company?

21 A Nineteen years.

22 Q Were you working there in 1953, '4 and '5?

23 A I was working there in 1964 and '5.

24 Q And what was your position then?

25 A I was the office manager at that time.

1 Q At Williamsville?

2 A Yes. Well, no, excuse me. I was in downtown Buffalo.

3 Q And are you the custodian of certain records of the  
4 Mobil Oil Company?

5 A Yes, I am.

6 Q Incidentally, during your employment with Mobil Oil  
7 Company, did you ever meet Mr. Joseph Weber?

8 A Yes, I have.

9 Q And do you see him seated there in the Courtroom?

10 A Yes, I do.

11 Q Now I would like to show you what has been marked as  
12 Exhibits 8 and 9. Would you pick up Exhibit 8, please,  
13 Mr. Goodwill?

14 A Exhibit 8.

15 Q What is that?

16 A It is a Wholesale Distributor Agreement between the  
17 Mobil Oil Corporation and Weber Oil Company owned by  
18 Joseph Weber, Incorporated.

19 Q And is that one of the records of the Mobil Oil Company?

20 A Yes, it looks like it, yes.

21 Q And is there a date on that?

22 THE COURT: Mr. Goodwill, keep your voice up,  
23 please.

24 THE WITNESS: Okay. It looks like it was made  
25 July 25, 1958.

1 BY MR. JONES:

2 Q And Exhibit Number 9, would you take a look at that,  
3 please. What is that?

4 A That also is a Wholesale Distributor Agreement between  
5 Weber Oil Company, owned by Joseph C. Weber, Incorporated  
6 and the Mobil Oil Company.

7 Q And is that one of the records of Mobil Oil Company?

8 A Yes, it is.

9 Q That you gave to me yesterday?

10 A Yes, it is.

11 Q And does that have a date on it?

12 A Yes. This has a date of January 13, 1965.

13 Q Now, were you familiar with the operations of the Mobil  
14 Oil Company back in '64 and '5?

15 A Certain operations I would be.

16 Q Did they have a relationship with a Weber Oil Company?

17 A Yes, they did, based on these documents.

18 Q And what was that?

19 MR. RAICHLE: I am sorry, what was that, based  
20 on - -

21 THE WITNESS: I say based on these documents we  
22 had a relationship.

23

24 BY MR. JONES:

25 Q And did you have personal knowledge of that too?

1 A I don't know as I understand your question.

2 Q Well, did you know Mr. Joseph Weber during '64 and '65?

3 A I met him sometime during that time, yes.

4 Q And do you know what the relationship between the Mobil  
5 Oil Company and the Weber Oil Company was?

6 A Well, we were a supplier to the Weber Oil Company.

7 Q And the Weber Oil Company paid the Mobil Oil Company  
8 for the oil that was supplied?

9 A Yes, they did.

10 Q Inviting your attention to Page 2 of that contract,  
11 there are some slips of paper attached to it. Do you  
12 see those?

13 A Yes, I do.

14 MR. RAICHLE: Is this the January 13, 1965 contract?

15 THE WITNESS: Yes.

16 MR. JONES: That is correct. At this point,  
17 your Honor, I would like to move in  
18 Exhibits 8 and 9.

19 MR. RAICHLE: What does he mean, "move in"?

20 MR. JONES: Evidence.

21 THE COURT: Move into evidence, I suppose, Mr.  
22 Raichle.

23 MR. RAICHLE: I have no objection.

24 THE COURT: No objection. Mark 8 and 9 in  
25 evidence, please. Do you have them

- 90 -

1 there, Mr. Goodwill?

2 THE WITNESS: Yes, I do.

3 MR. JONES: They have been marked, your Honor.

4 THE COURT: Take one thing at a time. Mark  
5 them in evidence, Mr. White.  
6

7 (Defendant's Exhibits Numbered 8  
8 and 9, respectively, received in  
9 evidence.)  
10

11 THE COURT: All right. You may continue, Mr.  
12 Jones.  
13

14 BY MR. JONES:

15 Q Inviting your attention back to Page 2 of that Exhibit  
16 Number 9, where I mentioned there was some slips of  
17 paper attached to it, do you see those?

18 A Yes, I do.

19 Q Now, there is something there about a special allowance.  
20 Do you see that?

21 A Yes, I do.

22 Q Can you read what that says, please.

23 A It says, "Appendent to above price structure: Mobilheat  
24 price \$.0965 F.O.B. Niagara Falls guaranteed through  
25 December 31, 1964. Special allowance - -"

1 MR. RAICHLE: Wait just a second. Excuse me. I  
2 am confused. That is probably no reason  
3 to stop the trial because I am confused.  
4 THE COURT: We can take our time. Mr. Goodwill,  
5 why don't you read a little slower, please.  
6 THE WITNESS: All right.  
7 MR. RAICHLE: It is something made in '65, guarantee-  
8 ing something that is over with in '64?  
9 MR. JONES: Your Honor, I am just asking the  
10 witness to read this and I am sure Mr.  
11 Raichle can cross examine if he wishes,  
12 but I would like to have him read that.  
13 THE COURT: Mr. Goodwill, can I see that, please.  
14 THE WITNESS: It is right here.  
15 THE COURT: In other words, when you looked in  
16 your records this slip was attached?  
17 THE WITNESS: Yes, sir.  
18 THE COURT: Right?  
19 THE WITNESS: Yes, sir.  
20 THE COURT: You may read. Take your time and  
21 we will find out what it means later.  
22 THE WITNESS: Would you like me to start over again?  
23 THE COURT: Yes, please.  
24 THE WITNESS: All right. It reads, "Appendent to  
25 above price structure: Mobilheat price

1 \$.0965 F.O.B. Niagara Falls guaranteed  
2 through December 31, 1964. Special  
3 allowance \$.0065 per gallon. Special  
4 allowance of \$.0065 per gallon to be  
5 the minimum allowance throughout the term  
6 of the contract."  
7

8 BY MR. JONES:

9 Q Now, Mr. Goodwill, turning to the last page of that  
10 contract, do you see certain signatures on there?

11 MR. RAICHLE: Excuse me. He hasn't finished  
12 reading it all.

13 THE COURT: I suppose, Mr. Raichle, if you want  
14 him to read something else you can have  
15 him read on cross examination.

16 MR. RAICHLE: I don't like to interrupt but I  
17 thought he was asked to read what was on  
18 there and he read a few lines and then  
19 stopped and stopped at the important place.

20 THE COURT: Let me see that. Mr. Jones, do you  
21 want the witness to read any further?

22 MR. JONES: Well, I don't have any particular  
23 objection, but I was concerned about the  
24 part about the special allowance and he  
25 read that and I want to move on to the

1 rest of my questions.

2 THE COURT: All right. So we will have it, if

3 he wants the rest of it read, read

4 beginning at "after".

5 THE WITNESS: "After January 1, 1965, any increase

6 in price, Weber to share 50 per cent to

7 a maximum of \$.0105 per gallon exclusive

8 of any V.A."

9 THE COURT: Mr. Raichle, Mr. Jones is asking

10 questions now. You will have a chance in

11 a minute, please.

12 MR. RAICHLE: I am a little impetuous. I'm sorry.

13 THE COURT: I am too sometimes.

14 MR. RAICHLE: All right.

15 THE COURT: Mr. Jones.

16 MR. RAICHLE: I will sit down.

17 MR. JONES: Is that satisfactory? Has he read

18 enough for you, Mr. Raichle?

19 MR. RAICHLE: He sure did. I want that part where

20 it says "Weber".

21

22 BY MR. JONES:

23 Q Mr. Goodwill, will you turn to the last page of the

24 contract, please, and do you see any signatures there?

25 A Yes, I do.

- 1 Q Can you read them?
- 2 A Yes. One is a J.A. Simpson for the Mobil Oil Company.
- 3 The other is Jospheh C. Weber, Incorporated, Joseph C.
- 4 Weber, president.
- 5 Q And is there a signature there for a sellers' salesman?
- 6 A Yes, there is.
- 7 Q And who is that?
- 8 A R.A. McGroder.
- 9 Q Now, can you explain, if you would, please, what a
- 10 special allowance is.
- 11 MR. RAICHLE: Wait a minute. I object to that.
- 12 The contract speaks for itself.
- 13 THE COURT: Well, is it defined in the contract?
- 14 MR. JONES: Not that I know of, your Honor.
- 15 THE COURT: I will overrule the objection. Are
- 16 you familiar with that term?
- 17 THE WITNESS: Yes sir, I am.
- 18 THE COURT: Is that a term used in a regular
- 19 fashion in your business?
- 20 THE WITNESS: Yes, it is.
- 21 THE COURT: All right. I will overrule the
- 22 objection.
- 23 MR. RAICHLE: On the further ground that it is
- 24 a conclusion.
- 25 THE COURT: We will listen to Mr. Goodwill's

1 explanation.

2 MR. RAICHLE: All right.

3 THE COURT: And then you may cross examine.

4  
5 BY MR. JONES:

6 Q Can you explain what that is, please?

7 A A special allowance would be an allowance given to a  
8 customer based on a competitive offer made to that  
9 customer.

10 Q And under what circumstances is it given, if you know?

11 MR. RAICHLE: Oh, I object to that. We are talking  
12 about the period of fifteen years here  
13 and he says, "Under what circumstances  
14 is that given". That is - -

15 THE COURT: I suppose there could be as many  
16 different circumstances as there are  
17 customers or companies.

18 THE WITNESS: Yes, there are.

19 THE COURT: It could vary?

20 THE WITNESS: Yes, it could.

21 THE COURT: All right. I will sustain the  
22 objection.

23  
24 BY MR. JONES:

25 Q Well, was such a special allowance given to the Weber

1 Oil Company?

2 MR. RAICHLE: I object, unless it shows he knows  
3 anything beyond what the document says.  
4 He didn't have anything to do with making  
5 this deal, did you?

6 THE COURT: I will overrule the objection. Mr.  
7 Goodwill.

8 THE WITNESS: Would you repeat the question for  
9 me?

10

11 BY MR. JONES:

12 Q Was a special allowance given to the Weber Oil Company?

13 A Yes, there was.

14 Q And was it paid to Joseph Weber individually?

15 MR. RAICHLE: Oh, I object to this.

16

17 BY MR. JONES:

18 Q If you know.

19 MR. RAICHLE: He hasn't laid any basis for know-  
20 ledge on the part of this man. He had  
21 nothing to do with the deal. He comes  
22 along - -

23 THE COURT: Wait a minute. For the present, I  
24 will sustain the objection. This is an  
25 agreement so it doesn't indicate anything

1 on the agreement about actual payments  
2 made, does it?

3 THE WITNESS: No, it doesn't.

4 MR. RAICHLE: I move to strike out his answer. It  
5 was made before my objection could be  
6 recorded.

7 THE COURT: I don't think he answered the question.  
8 If he did I will strike it.

9 MR. RAICHLE: All right.

10

11 BY MR. JONES:

12 Q Do you know whether such payments of a special allowance  
13 were made to Joseph Weber individually during the years  
14 '64 and '5?

15 A Yes, I do know.

16 Q And they were made to Mr. Weber individually, not to  
17 the Weber Oil Company, is that correct?

18 A That's correct.

19 Q And did you on any occasion ever have a discussion with  
20 Mr. Weber about this contract that you have identified  
21 between Mobil and the Weber Oil Company?

22 A I did not, no.

23 Q Were you present at one that took place?

24 A Yes, I was.

25 Q Now, how long did the Mobil Company deal, if you know,

1 with the Weber Oil Company?

2 A I couldn't answer that question with a firm years of  
3 agreements.

4 Q At any rate, they were during '64 and '5, as far as  
5 you know?

6 A That's correct.

7 Q Now, would you state whether you were present when  
8 dealings took place between the Weber Oil Company and  
9 the Mobil Oil Company? I think you said you were, is  
10 that right?

11 A I was on one occasion.

12 Q Now, do you know whether the Mobil Oil Company dealt  
13 with Mr. Weber in two different capacities?

14 A No, I do not know.

15 Q Do you know if they ever had any dealings with Mr. Weber  
16 during '64 and '5 as a broker?

17 A Not that I know of.

18 MR. RAICHLE: Well, I move to strike that out.  
19 The question was, "Do you know", and the  
20 answer to that is "Yes" or "No", and  
21 obviously - -

22 THE COURT: He says, "Not that I know of". We  
23 will let the answer stand to indicate  
24 lack of knowledge. If he does not know  
25 it is neutral.

1 BY MR. JONES:

2 Q Now, at the time that you were present and a discussion  
3 took place between Mr. Weber and some other people from  
4 Mobil, do you recall who else was present?

5 MR. RAICHLE: When and where was this?

6 MR. JONES: Well, I will ask him that.

7 THE WITNESS: I am not really sure.

8  
9 BY MR. JONES:

10 Q Do you recall anybody who was there?

11 A I believe, - yes, Mr. Nicoud.

12 MR. RAICHLE: Mr. who?

13 THE COURT: How do you spell that, please?

14 THE WITNESS: N-i-c-o-u-d.

15 THE COURT: Mr. Nicoud, who is he, Mr. Goodwill?

16 THE WITNESS: He was the district sales manager  
17 for Mobil Oil.

18 MR. RAICHLE: And when is this and where is it?

19 THE COURT: All right.

20  
21 BY MR. JONES:

22 Q Now, did Mobil Oil Company, if you know, request that  
23 the payments be made, this temporary allowance be paid  
24 to Mr. Weber individually?

25 MR. RAICHLE: Oh, I object to this.

1 THE COURT: I will sustain the objection. Mr.  
2 Jones, I thought we were going to hear  
3 about a conversation with Mr. Nicoud.  
4

5 BY MR. JONES:

6 Q Do you know when this conversation took place?

7 A I don't know the exact date.

8 Q What is your best recollection?

9 A I would guess that it was early 1965 or during the  
10 year of '65.

11 Q And can you state the general nature of that discussion,  
12 if you know?

13 A Well, my memory is not that good on that. The discussion  
14 was about an interpretation, as I recall, of his agree-  
15 ment.

16 Q Now, when you say, "Agreement", which agreement are you  
17 referring to?

18 A The agreement marked Exhibit 9.

19 Q Between the Weber Oil Company and Mobil?

20 A Yes.

21 Q Oil Company?

22 A Yes.

23 Q Now, this special allowance .65 cents per gallon, can  
24 you just explain how that worked, how was it calculated,  
25 if you know from your familiarity as office manager in

1 the company during '64 and '5?

2 A Well, we would take our monthly statistical sales  
3 records and based on the gallonage that the Weber Oil  
4 Company purchased from us, we would then apply this  
5 special allowance rate to that volume and then issue  
6 a check to Mr. Weber for that amount.

7 Q And do you know why it was issued to Joseph Weber and  
8 not to the Weber Oil Company, if you know?

9 MR. RAICHLE: I object to that. I would like a  
10 little voir dire, as he calls it, on that.

11 THE COURT: Mr. Jones, of course, we are having  
12 an interruption here. I think what we  
13 will do, Mr. Raichle, if you know, and  
14 Mr. Goodwill was thinking and I will  
15 overrule the objection and you can  
16 cross examine. Do you know why the pay-  
17 ments were made to Mr. Weber rather than  
18 to the Oil Company?

19 THE WITNESS: At his request, they were made to  
20 him as an individual.

21 MR. JONES: Would your Honor allow me just a  
22 moment, please.

23 THE COURT: Surely.  
24  
25

1 BY MR. JONES:

2 Q Just a few more questions, Mr. Goodwill. I think you  
3 said that the special allowance was given to your  
4 customers on certain occasions, is that correct?

5 MR. RAICHLE: That is what I thought your Honor  
6 sustained my objection to.

7 THE WITNESS: Yes.

8  
9 BY MR. JONES:

10 Q And - -

11 THE COURT: We just had - -

12 MR. RAICHLE: Wait a minute.

13 THE COURT: He testified to that before and I  
14 guess you want to use this question as  
15 a lead in to something else.

16 MR. JONES: That is correct.

17 THE COURT: I will overrule the objection.

18  
19 BY MR. JONES:

20 Q And who was the customer in that contract, Exhibit  
21 Number 9?

22 A The Weber Oil Company.

23 Q Now, do you have any personal familiarity with this  
24 Exhibit Number 8, the contract dated 1958?

25 A Only that it came from my files.

1 Q You had no connection with negotiating that contract  
2 or otherwise, correct?

3 A No, I did not.

4 MR. JONES: Thank you, Mr. Goodwill. That is  
5 all I have. Mr. Raichle has some  
6 questions.  
7

8 CROSS EXAMINATION BY MR. RAICHLE:  
9

10 Q The 065 or 0065 is a percentage of something, isn't it?

11 A Yes.

12 Q And a percentage of what Weber Oil Company, the  
13 corporation bought that 0065, that percentage was paid  
14 to Mr. Weber, wasn't it?

15 A Well, I don't know as I understand your use of that  
16 065 percentage.

17 Q Well, whatever it was, it was paid to Mr. Weber  
18 personally, wasn't it?

19 A That's correct.

20 Q And it was a percentage of the amount, whether 0065 is  
21 right or not I don't care, it was a certain percentage  
22 of the money that Weber Oil Company was paying to Mobil,  
23 wasn't it?

24 A You could call it that, yes.

25 Q Well, you called it that on your direct examination,

1           didn't you?

2   A       I didn't, - I don't recall. I said it was a percentage.  
3           It is a percentage of a dollar.

4   Q       Didn't you just testify a little while ago that you  
5           took the 0065 which was a percentage of the purchase  
6           price of gasoline by Weber Oil Company and paid it to  
7           Weber personally at his request?

8   A       That's correct.

9   Q       All right.

10  MR. JONES:                   Your Honor, I think that question -

11

12  BY MR. RAICHLE:

13  Q       And that is the fact, isn't it?

14  THE COURT:                   Just a minute. You both can't talk  
15                               at once. You object?

16  MR. JONES:                   I object because I think there may  
17                               be a misunderstanding between the witness  
18                               and Mr. Raichle.

19  THE COURT:                   If there is a misunderstanding  
20                               between the witness and Mr. Raichle, then  
21                               the witness can say, "I don't understand".  
22                               He has been in the business a long time.  
23                               He is certainly better acquainted with  
24                               these terms than any of the rest of us.  
25                               Mr. Goodwill, if you don't understand say,

"I don't understand, please rephrase  
the question". Mr. Raichle.

BY MR. RAICHLE:

Q Well, where were you in '63, '4 and '5, what were you  
doing?

A 1963 I was in the Syracuse District.

Q Had nothing to do with the Weber matter, did you?

A No, I did not.

Q And '64 you had nothing to do with it?

A I did, part of 1964.

Q What part?

A From May on.

Q May of what?

A May of 1964.

Q What is this business of a contract, if that is what  
this thing is dated January 13, 1965 which guarantees  
something through December 31, 1964; How do you do that?  
It is a mistake, isn't it?

A I don't believe so.

Q Well, when is that? Look here or look on your own.

THE COURT: Mr. Goodwill, keep your voice up,  
please.

THE WITNESS: Right.

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1 BY MR. RAICHLE:

2 Q This document, whether it is a contract or whatever it  
3 is, it is dated January 13, 1965, right?

4 A That is correct.

5 Q And that says, "Mobilheat price .0965 F.O.B. Niagara  
6 Falls guaranteed through December 31, 1964", and December  
7 31, '64 was overwith, wasn't it, by January 13, 1965?

8 A Yes, it was.

9 Q Well, did you ever see something like that before?

10 A Do you mean a retroactive contract?

11 Q Well, is that what you say this is?

12 A That is what I would call it.

13 Q All right. Now then, the part you didn't read until  
14 I insisted that you read it says this, look at it if  
15 you will, please.

16 A Yes.

17 Q "After January 1, 1965 any increase in price, Weber  
18 to share 50 per cent to a maximum of 0105 per gallon  
19 exclusive of any V.A.", whatever that is, is that right?

20 A That's right.

21 Q It doesn't say "Weber Oil Company to share", it says  
22 "Weber to share", doesn't it?

23 A That's right.

24 Q And Weber was the one who was getting the percentage,  
25 isn't that so?

- 1 A My agreement is with - -
- 2 Q Not your agreement. Weber is the one who was being
- 3 paid this percentage, isn't that so?
- 4 A It was paid to him as an individual, yes.
- 5 Q Yes. Did you ever see the books of account of the
- 6 Mobil Oil Company?
- 7 A No, I have not.
- 8 Q You don't know how this was treated on the books of
- 9 Mobil Oil, do you?
- 10 A Do you mean how we paid it?
- 11 Q Well, you paid it by check. You don't know what
- 12 bookkeeping entries were made, do you?
- 13 A No, I do not.
- 14 Q All right. Now, is Mr. Dicloud or McCloud, whatever
- 15 his name is, is he alive and well?
- 16 A He is alive as far as the last I knew.
- 17 Q Where is he?
- 18 A The last I knew he was on the west coast residing in
- 19 the State of Washington.
- 20 Q Who made the original deal with Mr. Weber concerning
- 21 his commissions, do you know?
- 22 A I do not know.
- 23 Q How long had his arrangements for commissions been in
- 24 existence before you heard about it?
- 25 A I don't know.

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1 Q About how long?

2 A I would use the 1958 contract as a starting point.

3 Q Well, his commissions aren't mentioned in there, are  
4 they?

5 A No, they are not.

6 Q Well, how would you use a contract which doesn't  
7 mention them as a starting point for his commissions?

8 A I would use that as a base for the beginning of our  
9 association with Mr. Weber.

10 Q So right from the beginning he was paid a commission,  
11 wasn't he, "Yes" or "No"?

12 A I don't know.

13 Q You don't know anything except what these papers which  
14 you call contracts show, is that right?

15 A We may have made other payments to him prior to - -

16 Q Do you know anything about it other than what is in  
17 these papers? I don't mean to be discourteous to you,  
18 but let's find out about the basic facts here. You  
19 don't know anything except what the documents show,  
20 do you, "Yes" or "No"?

21 A I don't know.

22 THE COURT: Wait a minute, Mr. Raichle. These  
23 affairs happened sometime ago. The  
24 witness is entitled to think and take  
25 his time.

1 BY MR. RAICHLE:

2 Q All right. Take all the time you want.

3 THE COURT: And he is not required to answer  
4 "Yes" or "No". Go ahead, Mr. Witness.  
5 Take your time and answer.  
6

7 BY MR. RAICHLE:

8 Q Do you remember the question or have you forgotten it?

9 THE COURT: Mr. Raichle, can you go back to  
10 the question?

11 MR. RAICHLE: I haven't forgotten it. I think  
12 he has, though.

13 THE WITNESS: Would you repeat it for me, please?  
14

15 BY MR. RAICHLE:

16 Q Sure. You don't know anything about it except what  
17 these papers show, isn't that so?

18 A No, that is not right.

19 Q All right. Do you know anything more than you have  
20 told us?

21 MR. JONES: I will object to that kind of a  
22 question, your Honor.  
23

24 BY MR. RAICHLE:

25 Q I mean about the matter at hand?

1 A No, I do not.

2 Q And the origin of the payment of the commissions doesn't  
3 appear in this '58 contract, does it?

4 A I didn't hear you, sir.

5 Q I say the origin of the commission arrangement isn't  
6 recorded in here anywhere, is it?

7 A No sir, it is not.

8 Q All right. Now, who in Mobil would know about that?

9 A I don't know.

10 Q Who is this guy J. Simpson, no relation to my friend  
11 Orenthal J. Simpson, is it?

12 A I don't know. I don't know your friend.

13 MR. RAICHLE: I see.

14 THE COURT: Just a minute. Mr. Raichle is  
15 referring to O.J.

16 THE WITNESS: Oh.

17 MR. RAICHLE: Orenthal James Simpson.

18 THE WITNESS: I am sorry.

19

20 BY MR. RAICHLE:

21 Q Incidentally, a client of mine, if I could boast a  
22 little bit. Who is this fellow McGroder, is he alive  
23 and well somewhere?

24 A Yes, he is.

25 Q When did you last see him?

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1 A Perhaps a year ago.

2 Q Where is he now?

3 A Cassadaga, New York.

4 Q And what is the other guy, the other gentleman's name;

5 Anybody else you had mentioned here? Oh, that is all.

6 I have nothing further.

7 THE COURT: Mr. Jones.

8  
9 REDIRECT EXAMINATION BY MR. JONES:

10  
11 Q Who does Mr. McGroder work for now, do you know?

12 A He is self-employed.

13 Q Doesn't work for Mobil?

14 A No, he does not.

15 MR. JONES: Thank you, Mr. Goodwill.

16 THE COURT: Mr. Goodwill, thank you.

17 THE WITNESS: You are welcome.

18 MR. JONES: I would like at this point, your  
19 Honor, if I may, to go into the interroga-  
20 tories and a response to the evidence.

21 THE COURT: Would you indicate to Mr. Raichle  
22 and Mr. Stephens which interrogatory and  
23 response, please?

24 MR. JONES: Certainly.

25 MR. RAICHLE: I won't hold up the trial. Go ahead.

1 MR. JONES:

Interrogatory Number 3, "Question, -  
2 This is an interrogatory served upon the  
3 plaintiff, "Please state the names and  
4 addresses of all persons in the Mobil  
5 Oil Company having knowledge of any  
6 terms on an agreement or agreements  
7 between Joseph C. Weber and the Mobil  
8 Oil Company. Response; The plaintiff  
9 is not presently aware of the names and  
10 addresses of persons in the Mobil Oil  
11 Company having knowledge of the terms  
12 of any agreement or agreements between  
13 Joseph C. Weber and the Mobil Oil Company  
14 as the wholesale representatives with  
15 whom Mr. Weber dealt are no longer employed  
16 by the Mobil Oil Company".

17 THE COURT:

Anything else, Mr. Jones?

18 MR. JONES:

I have nothing this afternoon, your  
19 Honor.

20 THE COURT:

All right. Ladies and gentlemen,  
21 we will be in recess until tomorrow  
22 morning. Go to the jury room a few minutes  
23 before ten and we will resume the trial.  
24 Counsel have informed me that it looks  
25 like probably we will finish tomorrow

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1 and so again, keep your minds open,  
2 do not make up your mind about any part  
3 of this case until you have heard all  
4 of it. You may go out with the Marshal  
5 and we will see you tomorrow morning.  
6

7 (Jury escorted from the Courtroom.)  
8

9 THE COURT:

If we could have the requests to  
10 charge, please, first thing in the morn-  
11 ing, I would certainly appreciate it.  
12 Mr. Jones, I believe all your cases are  
13 here.

14 MR. JONES:

Thank you, your Honor.

15 THE COURT:

If there is anything else you want  
16 to submit to me, we may be able to do it  
17 in the morning.

18 MR. JONES:

We may have some of those for you  
19 this afternoon, your Honor, some of the  
20 charges.

21 THE COURT:

Very good. We will be in recess.

22  
23 (Recess taken at 4:20 p.m.)  
24  
25

\*\*\*\*\*

1 PROCEEDINGS: November 5, 1975, 10:20 a.m.

2 APPEARANCES: As before noted.

3 (Jury present)

4  
5 THE COURT: Mr. Jones.

6 MR. JONES: Your Honor, the United States would  
7 at this point introduce in evidence,  
8 move into evidence, Defendant's Exhibit  
9 Number 7, which is a copy of the Article  
10 Certificate of Incorporation of Joseph C.  
11 Weber, Incorporated, 1949.

12 THE COURT: No objection?

13 MR. RAICHLE: No objection.

14 THE COURT: Mark it in evidence, please.

15  
16 (Defendant's Exhibit Number 7,  
17 received in evidence.)

18  
19 MR. JONES: Mr. Pfitzinger, please.

20  
21 H A R R Y A. P F I T Z I N G E R (46 Oak Manor Lane,  
22 Pitsford, New York), a witness called by and in behalf of  
23 the defendant, having been first duly sworn, was examined  
24 and testified as follows:

1 DIRECT EXAMINATION BY MR. JONES:

2 Q Mr. Pfitzinger, what is your occupation?

3 A I am an employee of the Mobil Oil Corporation. At  
4 the present time I am president of Langie Fuel Service.

5 MR. RAICHLE: Would you keep your voice up, please?

6 THE WITNESS: Yes. At Langie Fuel Service which  
7 is a fuel oil distributorship and a  
8 wholly owned subsidiary of Mobil Oil  
9 Corporation.

10

11 BY MR. JONES:

12 Q How long have you worked for the Mobil Oil Company or  
13 one of its subsidiaries?

14 A Thirty-four years.

15 Q Were you working there in 1964?

16 A Yes.

17 Q What was your position then?

18 A I was Heating Oil District Manager in the old Albany  
19 Division.

20 THE COURT: What was the word ahead of "Albany"?

21 THE WITNESS: I said, "The old Albany Division".  
22 It has since been dissolved.

23 THE COURT: "Old", o-l-d. In other words, at  
24 that time you had certain territory and  
25 you called it Albany Division and then

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1 after that it was dissolved?

2 THE WITNESS: Correct.

3 THE COURT: All right.

4  
5 BY MR. JONES:

6 Q What did the old Albany Division include?

7 A Well, the Division included everything from across  
8 upper New York State. My District went from Albany  
9 across the State also including any distributors across  
10 the State. It wasn't, - there was some distributors  
11 that were in the local retail districts and some that  
12 were in my Heating Oil District.

13 Q And basically, as head of that Heating Oil District,  
14 what were your duties?

15 A I was responsible for the relationship between Mobil  
16 and the distributors, the heating oil distributors and  
17 gasoline distributors also.

18 Q Did you, - did Mobil have a relationship with a  
19 distributor called Joseph C. Weber, Incorporated or  
20 the Weber Oil Company?

21 A Yes.

22 Q And what was that connection?

23 A He was a distributor of heating oil, of Mobil heating  
24 oil products.

25 Q Mobil supplied heating oil products to the Weber Oil

1 Company?

2 A Yes.

3 Q Whom did, - did you have any dealings with anybody in  
4 the Weber Oil Company?

5 A Yes. I had dealings with Mr. Weber.

6 Q The president? Now, did Mobil, to your knowledge, make  
7 any payments of a so-called, - well, any payments to  
8 Mr. Weber during '64?

9 A To the best of my recollection, we had at that time,  
10 what we call - -

11 MR. RAICHLE: That calls for "Yes" or "No". Did  
12 they or didn't they?

13 THE COURT: Let us start off with that.

14 THE WITNESS: All right. Yes, we did.

15

16 BY MR. JONES:

17 Q Can you explain what they were?

18 MR. RAICHLE: Well, wait a minute. I object to  
19 any conclusion by this man or anything  
20 borne of hearsay. Here is a company  
21 with thousands of employees.

22 THE COURT: You had dealings, - was Mr. Weber  
23 and the Weber Oil Company, was that under  
24 your direction or part of your supervision?

25 THE WITNESS: Part of my District, yes.

1 THE COURT: I will overrule the objection.

2 MR. RAICHLE: Would your Honor mind advising him  
3 he can testify only what he knows.

4 THE COURT: Of course. Mr. Jones, let us try  
5 to get to his recollection of what was  
6 said, what occurred.

7  
8 BY MR. JONES:

9 Q Certainly, your Honor. Do you know of the payments  
10 being made to Joseph Weber?

11 A Yes, we made payments to Joseph Weber.

12 Q What were those payments, if you know?

13 THE COURT: Mr. Pfitzinger, keep your voice up,  
14 please, so we can all hear.

15 MR. RAICHLE: I object to this question, "What  
16 were those payments". It gives him  
17 carte blanche to say anything he wants to.

18 THE COURT: Let me ask you this, Mr. Jones;  
19 I think in this, if possible, we ought  
20 to have the records. Mr. Pfitzinger, do  
21 you have the records? Does Mobil Oil  
22 still have the records of payments?

23 THE WITNESS: I have no records, sir. I have been  
24 away from this for ten years.

25 MR. JONES: I have some records here, your Honor,

1 which I am about to show him if I may.

2 THE COURT: All right, very well.

3 MR. RAICHLE: I object to them on the ground that  
4 no foundation has been laid.

5 THE COURT: There is no offer yet.

6 MR. JONES: I haven't even shown them to the  
7 witness yet.

8 THE COURT: Go ahead, Mr. Jones, ask the question.

9  
10 BY MR. JONES:

11 Q I want to show you what has been marked for identifica-  
12 tion as Defendant's Exhibit Number 12 and ask you if  
13 you can identify that. First, do you recognize your  
14 signature on it?

15 A Yes, that is my signature.

16 Q And that is a group of documents. Can you identify  
17 what those documents are?

18 A This is a, - well, what we considered a competitive  
19 allowance.

20 MR. RAICHLE: I move to strike out what is considered.

21 THE COURT: Yes. What are the documents?

22 MR. RAICHLE: May that go out, your Honor?

23 THE WITNESS: The document - -

24 THE COURT: Excuse me. Strike, "Competitive  
25 allowance". Tell us just what is the

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1 paper. Is it a record of something or  
2 other, what is it?

3 THE WITNESS: It is an authorization to make a  
4 payment to Joseph C. Weber.

5 THE COURT: All right. Let me see that for a  
6 minute. Is this a photocopy? This is  
7 a photocopy.

8 THE WITNESS: It looks like a photocopy to me.

9 THE COURT: All right. Is this a copy of some  
10 record kept by some corporation?

11 THE WITNESS: Yes. This is a record kept by Mobil  
12 Oil Company.

13 THE COURT: Where is the original of that, do  
14 you know?

15 THE WITNESS: No.

16 THE COURT: Go ahead, Mr. Jones.

17

18 BY MR. JONES:

19 Q Do you recognize those documents, Mr. Pfitzinger?

20 A I recognize my signature. I recognize this as the  
21 kind of document that went through my office many  
22 times, at that time.

23 Q And are those described as Credit Invoices?

24 A Yes.

25 MR. RAICHLE: Where does it say, "Credit Invoice"?

1 THE COURT:

2 Mr. Jones, can't you let the witness  
3 testify? He is the man that is familiar  
4 here. You are drawing conclusions. First  
5 of all, Mr. Raichle and the jury and the  
6 Court, we have a paper here which is a  
7 copy of some paper. The rules of evidence  
8 clearly say that if you have the original  
9 paper, that should be here. Maybe Mr.  
10 Raichle can agree that we could go ahead  
11 with a copy and maybe he won't agree but  
12 if you cannot have the original, we ought  
13 to have some explanation. These are  
14 basic rules of evidence and if there is  
15 going to be any agreement here, or any  
16 copy brought in here, without the original  
17 or explanation of where the original is  
18 at the present time, you should have  
19 talked to Mr. Raichle beforehand about it.  
20 All right, continue.

21 MR. JONES:

22 I might say, your Honor, I listed  
23 this document - --

24 THE COURT:

25 Wait a minute. I do not want to  
have any explanations or arguments before  
the jury. You continue with the witness.

1 BY MR. JONES:

2 Q Can you describe that document, Mr. Pfitzinger?

3 MR. RAICHLE:

I object to his describing. It  
either speaks for itself, if it is legal  
and competent.

6 THE COURT:

Ladies and gentlemen, can you step  
out a minute, please, so I can find out  
what this paper is and where it came  
from and whether we ought to have it in  
before you.

(Jury escorted from the Courtroom.)

14 THE COURT:

Evidently, Mr. Jones, we have a  
copy here and I'm sure you have good  
reason for only having a copy. Why is  
that so?

18 MR. JONES:

Well, a number of these records  
are maintained in Philadelphia, your  
Honor, and we wrote and asked for some  
documents. We first asked the plaintiffs  
what records they had of this relationship  
between Mobil and the Weber Oil Company  
and they indicated they had no records  
and indicated that they did not know who

1 in the Mobil Company was connected with  
2 these, did have the records or did have  
3 knowledge of the relationship. We then  
4 received a name of an attorney who was  
5 in Scarsdale, New York, out of this  
6 district who did have some documents and  
7 these were Mobil documents.

8 THE COURT:

Was he an employee of Mobil Oil?

9 MR. JONES:

Yes, he was, and he gave us the  
10 name of Mr. Pfitzinger and Mr. Goodwill.  
11 Now, at one point, it was years ago, a  
12 deposition was supposed to be set up in  
13 New York City in regard to these documents  
14 and as I recall, we sent or made available  
15 a number of these documents to Mr.  
16 Raichle's firm and the deposition was  
17 dispensed with. The deposition was not  
18 set up by myself but by another attorney.

19 MR. RAICHLE:

You don't claim you sent these, do  
20 you? I never saw these.

21 THE COURT:

I suppose there are faults here. I  
22 try criminal cases almost all the time,  
23 Mr. Jones, and, of course, I would  
24 certainly never, under this showing, permit  
25 this kind of a document to be presented

1 in a criminal case. It seems to me if  
2 you want documents from the Mobil Oil  
3 Corporation, you have a very simple way  
4 to do it. You simply describe the document.  
5 You send a notice, you send a subpoena.  
6 You notice the company for deposition  
7 taking and they, no doubt, would send you  
8 a document with the explanation, a copy  
9 of it with an explanation. You can show  
10 it to Counsel on the other side and you  
11 can then have a record of the fact that  
12 this is a copy which people can be sure  
13 of. If you had some kind of agreement  
14 with Mr. Raichle beforehand that if you  
15 had something here that he was able to  
16 look at this beforehand, check into its  
17 authenticity, well, that is something  
18 else again, but now we have a man, - Mr.  
19 Pfitzinger, this document here you have  
20 looked at. It has your signature on it,  
21 this copy. Could I see it for a minute,  
22 please. It was made in 1964, is that true?

23 THE WITNESS:

Correct.

24 THE COURT:

25 And you say your signature, that is  
where it says "Approval", that is your

1

signature?

2

THE WITNESS:

Right.

3

THE COURT:

And what would happen to this after you would sign it, do you remember?

4

5

THE WITNESS:

A check would be issued. Whatever was requested in the way of payment, it could have been credited, a check could be issued. On that it states that there was a request for check.

6

7

8

9

10

THE COURT:

What would happen to the original document, where would it be sent, do you know?

11

12

13

THE WITNESS:

No, I wouldn't know, sir.

14

THE COURT:

These are all similar. They have up in the corner, "Credit Invoice".

15

16

THE WITNESS:

I didn't look through all of them, sir.

17

18

THE COURT:

I have looked through them and they all say up in the right-hand corner, "Credit Invoice". In your business, what do you mean by "Credit Invoice"?

19

20

21

22

THE WITNESS:

Something that would be credited to the customer.

23

24

THE COURT:

In this case, Joseph C. Weber Incorporated, right?

25

1 THE WITNESS: Right.

2 THE COURT: And these are various dates and

3 what would the dates mean?

4 THE WITNESS: Well, let me see.

5 MR. RAICHLE: If I can have just a word.

6 THE COURT: Can I continue, Mr. Raichle?

7 MR. RAICHLE: I beg your pardon.

8 THE COURT: Then you can have a word.

9 THE WITNESS: This is the date this form was made

10 out requesting this kind of a credit to

11 this person.

12 MR. RAICHLE: That is important. It wasn't to

13 the corporation.

14 THE COURT: I know. Let us just look at the

15 document. You, Mr. Raichle, I'm going

16 to let you ask this man all the questions

17 you want.

18 MR. RAICHLE: I will sit down.

19 THE COURT: I just want to get something straight

20 in my mind. In this case here it would

21 indicate there was a payment, \$198.96,

22 and in this case it says, "Make out and

23 mail check to Joseph C. Weber, 932 Cayuga

24 Drive, Niagara Falls, New York".

25 THE WITNESS: Right.

1 THE COURT:

Mr. Pfitzinger, in your experience  
2 with Mobil Oil and the use of these  
3 documents, can you tell us, without  
4 question that this particular record  
5 would indicate that at or about the date  
6 here, August 25, 1964, that this \$198.96,  
7 that a check would have been issued to  
8 the person whose names appear here, - Mr.  
9 Weber, is that right?

10 THE WITNESS:

That would be the procedure.

11 THE COURT:

Mr. Raichle, do you want to ask  
12 some questions?

13 MR. RAICHLE:

When his Honor first asked you, you  
14 said it was credited to the Weber Oil  
15 Company, didn't you?

16 THE WITNESS:

I don't - -

17 MR. RAICHLE:

The company.

18 THE WITNESS:

I thought I said it could either be  
19 done in the form of a credit or a check,  
20 if a check was requested. That is my  
21 recollection of what I said.

22 MR. RAICHLE:

It is a check to Joseph Weber  
23 individually, isn't it?

24 THE WITNESS:

That is what it says here.

25 MR. RAICHLE:

And that is all you know about it,

1 isn't it?

2 THE WITNESS: Ten years ago, you know. I can  
3 only go by what I am looking at.

4 MR. RAICHLE: But when the Court first asked you,  
5 you said it was a credit to the corporation,  
6 the Weber Corporation, didn't you?

7 THE WITNESS: Well, up at the top you will note  
8 that it says, "Joseph C. Weber, Inc."  
9 See that in the upper left-hand corner?

10 MR. RAICHLE: Yes.

11 THE WITNESS: And the credit, the paper is made  
12 out to Joseph C. Weber, Inc. The notation  
13 at the bottom states, "Make out and mail  
14 check to Joseph C. Weber", et cetera, so  
15 the name of the corporation is at the  
16 top and that would be, - we would be  
17 issuing it to the corporation with  
18 instructions to have the check made out  
19 to Joseph C. Weber.

20 MR. RAICHLE: Who is receiving the credit?

21 THE COURT: Mr. Raichle, can we do this; I  
22 would like to step back just for a minute.

23 MR. RAICHLE: Yes, sir.

24 THE COURT: As far as this paper, you assure us  
25 that your experience indicates that at

1 that time that a check would have been  
2 issued to Mr. Weber and this was as a  
3 result of some kind of dealing which is  
4 reflected there in a short analysis of  
5 number of gallons and so forth, with the  
6 Weber Oil Company or Joseph C. Weber, Inc.?

7 THE WITNESS:

Correct.

8 THE COURT:

9 Mr. Raichle, rather than do this  
10 all over again, when the jury is here,  
11 it appears to me that I am satisfied that  
12 this is a copy of an original record and  
13 I will permit it to be marked in evidence.  
14 Why don't we have the jury come back and  
15 then we can continue with the direct and  
the cross examination.

16 MR. RAICHLE:

Could I make a point while we are  
here together?

18 THE COURT:

Surely.

19 MR. RAICHLE:

20 I will state my position, my point,  
21 which I am very anxious to say and I don't  
22 want to be bobbing up and down in front  
23 of the jury every time a bit of evidence  
24 comes in affecting my position on my  
25 point. Now, the position of the point is  
this, that the stipulation plain and

1 unambiguous is to the effect that the  
2 Mobil Oil Company paid commissions to  
3 Joseph C. Weber individually. Now,  
4 if these documents, - not sufficiently  
5 authenticated but I understand your Honor  
6 has ruled on that, are offered for the  
7 purpose of impeaching the stipulation or  
8 establishing a fact contrary to the  
9 stipulation, more particularly if they  
10 are trying to show that the payments to  
11 Mr. Weber were something other and differ-  
12 ent from commissions, then I object to it  
13 because it seems to me, under the law,  
14 and particularly in this situation you  
15 may not impeach, - he may not offer  
16 evidence contrary to the stipulated fact.  
17 Indeed, in the preamble of the stipulation,  
18 which is certainly a part of it, - it is  
19 more than a preamble. It is part of the  
20 stipulation. It says, "It is hereby  
21 stipulated by and between the parties  
22 through their respective Counsel, that  
23 for the purpose of this action the follow-  
24 ing facts herein set forth are to be taken  
25 as true and correct in the same manner as

1 if they were duly proved provided, however,  
2 that either party may introduce other  
3 and further evidence not inconsistent with  
4 the facts herein stipulated". I object  
5 to any document or any testimony which  
6 is offered for the purpose of establishing  
7 a fact inconsistent with the facts so  
8 clearly stipulated. Now, the purpose of  
9 this, I suppose, is to play around the  
10 language at the top that says, "Charged  
11 realization temporary allowance", and I  
12 suppose he wants to do some word chopping  
13 about allowance vs. commission and I  
14 object to that.

15 THE COURT:

Mr. Jones, do you want to say any-  
16 thing?

17 MR. JONES:

Yes, your Honor. Judge Henderson,  
18 in denying our motion to amend the stip-  
19 ulation and substitute the word "Payments"  
20 for the word "Commissions" specifically  
21 allowed us to at least argue to the trial  
22 court and seek to put in proof as to the  
23 relationship between the Weber Oil Company  
24 and the Mobil Oil Company and that is  
25 what we seek to do here. I think that if

1 this fact had been stipulated away which  
2 is what Mr. Raichle contends, it would  
3 have been inconsistent to have at the end  
4 of the stipulation the statement as one  
5 of the issues being whether the commissions  
6 were earned by Joseph Weber or by Weber,  
7 Incorporated.

8 THE COURT:

Well, I will permit the - -

9 MR. RAICHLE:

Pardon me. I know it is inadvertent,  
10 but that isn't what the stipulation says.  
11 May I read the last paragraph?

12 THE COURT:

Surely.

13 MR. RAICHLE:

This is after, - I will read the last  
14 few paragraphs.

15 THE COURT:

Is this the stipulation or Judge  
16 Henderson's - -

17 MR. RAICHLE:

This is Judge Henderson's - --

18 THE COURT:

Decision.

19 MR. RAICHLE:

Opinion. This is the next to the  
20 last paragraph, "This Court will not over  
21 objection, set aside or modify a stipula-  
22 tion of fact entered into voluntarily  
23 between the parties absent a clear showing  
24 of manifest injustice. Such a showing has  
25 not been made by the Government in this

1 action", and the showing then was the  
2 same as now, as I am adding. Now, here  
3 is the last paragraph, "Whether the use  
4 of the 'commission' in that stipulation  
5 precludes the Government from offering  
6 evidence or advancing a particular theory  
7 as to the relationship between the  
8 plaintiff and Mobil Oil Company is more  
9 appropriately the subject of argument and  
10 rulings at the trial of this action".  
11 That is far from saying that they may do  
12 it. It says it is a subject to be, - that  
13 of concern by the trial court. Now, the  
14 stipulation means absolutely nothing if  
15 you can offer evidence contrary to the  
16 stipulated fact.

17 THE COURT:

18 There are several cases, Mr. Raichle,  
19 which have said that although the word  
20 "Commission" was used between the parties  
21 standing in the same shoes as Mobil and  
22 the individuals standing in the same shoes  
23 as Mr. Weber in this case, that the Court  
24 could look at all of the circumstances  
25 surrounding the relationship of Mobil, Mr.  
Weber and the Weber Oil Company and the

1 Court, and in this case the jury, make a  
2 determination as just what the circumstances  
3 were, so I'm going to permit the question-  
4 ing to continue.

5 MR. RAICHE:

6 Then may I be considered to have an  
7 objection to any line of proof and  
8 particularly this line of proof which  
9 tends to impeach the stipulated fact or  
10 repudiate it or change or vary it. I mean  
11 so I won't be - -

12 THE COURT:

13 Your position is certainly clear on  
14 the record and I will overrule the  
15 objection.

16 MR. JONES:

17 May I have the last question read  
18 back before the jury was asked to leave  
19 the courtroom, your Honor.

20 THE COURT:

21 If Mr. Knisley can find it.

22 (Jury returns to the courtroom.)

23 The following was read by the  
24 stenographer:

25 ("Question: Can you describe that  
document, Mr. Pfitzinger?")

THE COURT:

This document, Defendant's Exhibit 12,

1 mark it in evidence.

2 MR. RAICHLE: I say it speaks for itself or it  
3 doesn't speak at all.

4  
5 (Defendant's Exhibit 12 received in  
6 evidence.)

7  
8 THE COURT: We will have to wait for the question,  
9 Mr. Raichle.

10  
11 BY MR. JONES:

12 Q Can you describe that document, Mr. Pfitzinger?

13 MR. RAICHLE: And I have the objection to his so  
14 doing.

15 THE COURT: All right. Overruled.

16 THE WITNESS: This is a document of the Mobil Oil  
17 Corporation. It is a temporary allowance  
18 that was issued to Joseph C. Weber, Incorporated,  
19 Niagara Falls, New York, on  
20 August 25, 1964 in the amount of \$198.96,  
21 with instructions to make out and mail  
22 check to Joseph C. Weber, 932 Cayuga  
23 Drive, Niagara Falls, New York.

24 MR. RAICHLE: I have the additional objection that  
25 you can't bind Weber by something he has

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1 never seen.

2 THE COURT: That is argument.

3 MR. RAICHLE: I thought it was pretty good  
4 argument.

5 THE COURT: It may or may not be but it is  
6 argument and you may make the argument  
7 but as far as objection, I overrule the  
8 objection.

9  
10 BY MR. JONES:

11 Q Were you personally familiar with that document at the  
12 time you put your signature on it?

13 A I would have had to have been to have signed it, yes.

14 Q And - -

15 MR. RAICHLE: I move to strike that out.

16 THE COURT: Overruled.

17  
18 BY MR. JONES:

19 Q The next document underneath that, is that similar to  
20 the one you have just described?

21 A Yes.

22 Q And does that authorize an amount for payment?

23 A The instructions on this is, "Issue check".

24 Q Does it, - in the second page that you are looking at  
25 now, does that indicate how much?